REME COURT, U. S.

Office-Supreme Court, U.S.
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IN THE

United States Court of Appeals

OCTOBER TERM, [redacted] 1970

No. [redacted] 248

INDIANA REVENUE BOARD, ET AL.
Petitioners,

vs.

STATE OF INDIANA, on the relation of the City of Indianapolis, as successor in interest to the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, and RICHARD M. GIVAN and JOHN F. NEFF;

Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA

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Appendix A

STATE EX REL. MASS TRANSP. AUTH. v. INDIANA REV. BD.

Cite as 253 N.E.2d 725

STATE of Indiana, on the relation of the MASS TRANSPORTATION AUTHORITY OF GREATER INDIANAPOLIS, a municipal corporation, Plaintiff,

v.

INDIANA REVENUE BOARD, Edgar D. Whitcomb, as a Member of the Indiana Revenue Board, John K. Snyder, Treasurer of the State of Indiana, and as a Member of the Indiana Revenue Board, Trudy Slaby Etherton, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board, Indiana Department of State Revenue, James O. Mathis, as Commissioner of the Indiana Department of State Revenue, The State Board of Tax Commissioners, Joseph D. Geeslin, Jr., Carleton L. Phillippi, and Durwood Strang, as Members of the State Board of Tax Commissioners of Indiana, Richard D. Green, as Inheritance Tax Administrator, Defendants.[1]

No. 767 A 39.

Appellate Court of Indiana.

In Banc.

Dec. 16, 1969.

Transfer Denied Dec. 17, 1969.

Action to enforce judgment requiring members of State Revenue Board and other state officers to comply with Act

[1] On December 31, 1968, the date of the judgment in this case, the named defendants were the then incumbent officeholders and were named in their capacities as such officeholders, viz: Roger D. Branigin, as a Member of the Indiana Revenue Board; John P. Gallagher, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board; William L. Fortune, Commissioner of the Indiana Department of State Revenue; and Larry P. Mohr and Herbert C. Holmes, as Members of the State Board of Tax Commissioners of Indiana; and T. Michael Smith, as Inheritance Tax Administrator. This court takes judicial notice that these named defendants are no longer in office, and the court, on its own motion has substituted the present incumbents in office as the nominal defendants.

providing for distribution of inheritance tax funds on basis of 10% to state and 90% to mass transportation authority of Marion County. The Appellate Court held, among other things, that retroactive appeal of Act was not applicable to judgment which was in force prior to repeal and which required compliance with the Act.

Order of payment of judgment.

1. **Appeal and Error** ⇨330(2)

All actions of members of State Revenue Board and other state officers under Act providing for distribution of inheritance tax funds on basis of 10% to state and 90% to mass transportation authority of Marion County were ministerial in nature, and when they left office after judgment was entered that they comply with Act, Appellate Court in action to enforce judgment could on its own motion substitute their successors as defendants.

2. **Appeal and Error** ⇨336(1)

Where parties defendants appeared voluntarily and generally in cause without raising issue of Appellate Court's jurisdiction over them, error, if any, was waived.

3. **Appearance** ⇨24(5)

Where a successor party to a cause voluntarily appears, any error in service of process is waived. Burns' Ann. St. § 2-803.

4. **Parties** ⇨59(2)

Where a suit is maintained against a public officer, not the individual office holder, then the successor in office becomes the interested party to the suit.

5. **Constitutional Law** ⇨92
Statutes ⇨273

Generally, General Assembly may retroactively repeal legislation with two exceptions: (1) General Assembly shall not impair vested rights, and (2) General Assembly shall not violate a constitutional guarantee.

6. **Constitutional Law⇨92**

The grant to an agency of the state does not, and cannot, vest rights and can thus be retroactively and prospectively repealed by General Assembly.

7. **Statutes⇨273**

Act repealing retroactively Act providing for distribution of inheritance tax funds on basis of 10% to state and 90% to mass transportation authority of Marion County was a legitimate and constitutional exercise of legislative power.

8. **Statutes⇨276(1)**

Retroactive appeal of Act providing for distribution of inheritance tax funds on basis of 10% to state and 90% to mass transportation authority of Marion County was not applicable to judgment which was in force prior to repeal and which required members of State Board of Revenue and other state officers to comply with statute. Const. art. 3, § 1.

9. **Constitutional Law⇨52**

The General Assembly cannot interfere with a judicial determination. Const. art. 3, § 1.

10. **States⇨191(2).**

The defense of sovereign immunity was no defense to action to enforce judgment requiring members of State Revenue Board and other state officers to comply with Act providing for distribution of inheritance tax funds on basis of 10% to state and 90% to mass transportation authority of Marion County.

11. **Constitutional Law⇨73**

The Appellate Court did not interfere with financial policy of state when it ordered payment of judgment requiring members of State Revenue Board and other state officers to comply with Act providing for distribution of inheritance tax funds on basis of 10% to state and 90% to mass transportation authority of Marion County.

12. Constitutional Law⇨67

It is the proper and legitimate function of any court to authorize execution on its judgments; to deny it this right would be to deny existence of judicial branch of government.

13. Taxation⇨908

The Act providing for distribution of inheritance tax funds on basis of 10% to state and 90% to mass transportation authority of Marion County is a revenue allocation amendment which provides for allocation of revenues collected under the Inheritance Tax Act. Const. art. 10, § 3.

14. States⇨131

An allocation by law is an "appropriation" of revenues. Const. art. 10, § 3.

See publication Words and Phrases or other judicial constructions and definitions.

15. States⇨181

The statute referring to examination and liquidation of claims against state is not applicable where claim is for enforcement of valid legislative enactment containing an appropriation and allocation of inheritance tax revenues. Burns' Ann.St., § 49-1702.

16. Taxation⇨913½

Under statutes all inheritance tax revenues are placed in inheritance tax account which is maintained as part of general fund, and monies are then appropriated according to allocations schedule contained in appropriation act. Burns' Ann.St., §§ 7-2414, 49-1702, 49-1810, 61-202.

17. Taxation⇨917

Under statutes, if general fund into which inheritance tax revenues are placed has sufficient monies to pay amount allocated by Act of General Assembly, then auditor is bound by law to draw a warrant for that amount on treasurer of state, who is bound by law to honor it. Burns' Ann. St., §§ 7-2414, 49-1702, 49-1810, 61-202.

18. Constitutional Law⇨79

It is not within scope of powers granted to executive branch of government that it should sit as a superjudiciary to decide which laws and judicial determinations it will obey and which it will not. Const. art. 3, § 1.

Donald E. Bowen, John F. Neff, Lieber & Neff, Indianapolis, for plaintiff; Bowen, Myers & Northam, Indianapolis, of counsel.

Theodore Sendak, Atty. Gen., Wendell C. Hamacher, Chief Counsel, for defendants.

PER CURIAM.

A number of issues have been raised in the course of this action which the court deems expedient and necessary to discuss.

This case was originally filed in the Superior Court of Marion County and was removed to this court pursuant to Acts 1965 (2nd Spec.Sess.), ch. 7, § 2, p. 28, Burns' Ind. Stat. Ann., § 3-2121, 1968 Repl., on petition of the Attorney General of Indiana. Section 3 of the Act (§ 3-2122) provides that,

> "* * * the attorney-general shall remove such case to the Appellate Court of Indiana whenever he deems it necessary or desirable for the purposes of the uniform and orderly enforcement and effectiveness of acts of the general assembly of state-wide public interest and concern that the case be determined *by a court with state-wide jurisdiction.*" (Emphasis supplied.)

Following the removal, hearings were held, briefs were filed and arguments were made by both parties to the issues on the merits, all pursuant to statute, and thereafter, on December 31, 1968, this court, speaking through Judge Cooper, entered judgment in favor of plaintiff and against defendants.[2]

[2] State ex rel. Mass Transp. Authority, etc v. Indiana Revenue Bd., Ind. App., 242 N.E.2d 642, 16 Ind. Dec. 334 (1968).

The thrust of that judgment was to hold that House Enrolled Act No. 1818, passed by the 1967 General Assembly of Indiana was unconstitutionally vetoed by inaction of the Governor, and thus, this court deemed said Act to be in full force and effect from and after its effective date.

This court in the traditional exercise of its judicial power simply interpreted the law. Article III, § 1 of the Constitution of Indiana specifically divides the functions of government into three co-equal, exclusive branches. The function of interpreting the law is vested exclusively in the judicial branch. The decision of this court did no more and no less. This court did not usurp a function of the Legislature; to the contrary, life was given to *their* action which theretofore had been unconstitutionally denied.[1]

Subsequently, the defendant filed its petition to transfer to the Supreme Courts which petition was denied with opinion,[2] thus affirming the judgment of this court of December 31, 1968.

Thereafter the General Assembly of 1969 passed House Enrolled Act No. 1115 (Acts 1969, ch. 20), which purported to repeal retroactively House Enrolled Act No. 1818 of the 1967 General Assembly.

The pleadings filed herein serve to raise the following issues for consideration:

1. The validity of the substitution of parties-defendants;
2. The effect of the purported retroactive repealer;
3. The right of the defendants to interpose the defense of sovereign immunity;
4. The effect of the "separation of powers" doctrine upon the decision of this court.

I. SUBSTITUTION.

[1] Defendants argue that, with the exception of John K. Snyder, Treasurer of the State of Indiana, and as a

[1] State ex rel. Mass Transp. Authority, etc. v. Indiana Revenue Bd., Ind., 244 N.E.2d 111, 16 Ind. Dec. 449 (1969).

[2] Acts 1881 (Spec. Sess.), ch. 38, § 654, p. 240, Ind. Stat. Ann., § 2-3232, Burns' 1968 Repl.

Member of the Indiana Revenue Board, all other parties-defendants were improperly substituted to the judgment of this court dated December 31, 1968, by the court on its own motion; were never served with process; and should not be bound by that judgment.

As authority for the above proposition, defendants cite *Cox v. United States*, 9 Wall. (76 U.S.) 298, 19 L.Ed. 579, (1870). The *Cox* holding, however, is not applicable here.

The question raised in *Cox* was whether the newly appointed Secretary of the Interior could be substituted without notice as a party to a writ of mandamus. The judgment of the district court in *Cox* mandated the former Secretary of the Interior and his successor in office to grant a patent for certain lands. The issuance of a patent was held by the Supreme Court to be an act within the discretion of the Secretary of the Interior, and thus a successor in office would have to be given the opportunity to exercise his discretion and would not be bound by a writ issued before such opportunity was afforded. The determinative rationale of the *Cox* decision was that the courts have no power to mandate the discretionary acts of an executive official.

However, the court then distinguished the situation from that where the official was carrying out a ministerial function, as stated at page 298 of 9 Wall. at page 583 of 19 L.Ed.:

> "Discussion of the principle, however, seems to be unnecessary, as all of the cases appear to affirm the same rule, that the writ cannot issue where discretion and judgment are to be exercised by the officer, and only in cases where the act required to be done is merely ministerial, and where the relator is without any other adequate remedy."

In the instant case, all actions required of the defendants under House Enrolled Act No. 1818 are ministerial in nature. Under Article 6, § 1 of the Constitution of Indiana, the Treasurer and Auditor of this State are commanded to "* * * perform such duties as may be enjoined by law; * * *." The duties of the Auditor in this regard are not

discretionary but strictly ministerial and, thus, the question of due process raised in *Cox* is not present here. The prescription of responsibility may not be altered, for the reason that there is no element of discretion available.

The precise issue here raised has been answered by our Supreme Court. In Wood, Treas. v. State ex rel. Seiler, 155 Ind. 1, at pages 7-8, 55 N.E. 959, at pages 961-62, (1900), the Supreme Court established the following precedent for substitution of public officeholders:

> "The petition and alternative writ aver that a prior demand was made of Delos N. Weaver, as treasurer of Elkhart county, and who was at the time such officer, and by him, as such officer, refused; that, pending the action, Weaver's term expired, and appellant, Wood, succeeded him in the office, January 1, 1899, which fact being disclosed by a supplemental complaint, the court substituted Wood as the party defendant.
>
> "The office of county treasurer is a continuing one. The remedy sought was the payment of money by the officer—a purely ministerial function. The demand was against Weaver the officer, and not against Weaver the individual, and when Weaver went out, and Wood went in, the party defendant was the same, but represented by another individual. Wood assumed the office impressed with all the legal duties and obligations that rested upon the officer he then was. He took the office *lis pendens*, and was bound to know the character of the plaintiff's action, and that the complaint charged that a demand of payment had been properly made of his predecessor, and refused, and if it was his pleasure to pay the plaintiff's demand without judicial determination, it was his duty to do so without further demand. To hold otherwise would be to place it in the power of such officers, by the expiration of terms of office and resignations, effectually defeat the ends of justice."

No valid distinction can be drawn between the office of County Treasurer, which is a constitutional office, and the offices held by defendants in the instant case.

While the duties of the Auditor and the Treasurer of this State are not entirely ministerial, the duties required of them by House Enrolled Act No. 1818 are totally and completely ministerial in nature. Thus, it was not improper for this court to substitute the nominal defendants on its own motion.

[2] The court is further constrained to point out on numerous occasions,[5] the parties-defendants appeared voluntarily and generally in this cause without raising the issue of our jurisdiction over them, and thus, error, if any, has been waived.

[3] Additionally, it has been held that where a successor party to a cause voluntarily appears, any error in service of process is waived.

See: Finch, Admr. v. McClellan, 77 Ind.App. 533, 130 N.E. 13, 131 N.E. 236 (1922), (Transfer denied);

Holland v. Holland et al., 131 Ind. 196, 30 N.E. 1075 (1892);

Acts 1881 (Spec.Sess.), ch. 38, § 56, p. 240, Burns' Ind.Stat.Ann., § 2-803, 1967 Repl.

The two issues raised by the defendants, as demonstrated, present no error.

The substitution was a valid exercise of judicial discretion (Wood, *supra*) and by voluntarily appearing in this cause, the provisions for notice were waived. Section 2-803, *supra*.

The named defendants in this action have all been made parties by reason of their ministerial and representative

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[5] Defendant's petition for rehearing, January 13, 1969;
Defendants' motion to dismiss, April 11, 1969;
Defendant John K. Snyder, motion for enlargement of time in execution of order, October 29, 1969;
Defendants motion to vacate order, October 29, 1969;
Defendants' request for early ruling, November 4, 1969;
Defendants' motion to vacate order, November 7, 1969;
Defendants' petition for stay of execution, November 10, 1969;
Defendants' petition for rehearing, November 10, 1969;
Defendants' motion for new trial, November 14, 1969.

capacities, and for no other reason. Their voluntary and general appearances have waived the error, if any, in the court's substitution.

[4] As additional authority for the substitution, it is well established law in this State, that where a suit is maintained against a public officer, not the individual office-holder, then the successor in office becomes the interested party to the suit.

See: Advisory Board etc. v. State ex rel., 170 Ind. 439, 85 N.E. 18 (1908);

Schrader v. State ex rel. Mason, 157 Ind. 341, 61 N.E. 721 (1901);

State ex rel. v. Long, 174 Ind. 642, 92 N.E. 649 (1910).

II. RETROACTIVE REPEALER.

[5] As a general rule in Indiana, the General Assembly may retroactively repeal legislation with two exceptions:

1. The General Assembly shall not impair vested rights;
2. The General Assembly shall not violate a constitutional guarantee.

See: Johnson v. Board of Commissioners of Wells County et al., 107 Ind. 15, 8 N.E. 1 (1886);

Osann v. Purported Town of Portage, 132 Ind.App. 695, 177 N.E.2d 666 (1962), (Transfer denied);

Guthrie v. Wilson, 240 Ind. 188, 162 N.E.2d 79 (1959).

As the court shall point out herein, there is a third exception.

In County Dept. of Public Welfare etc. v. Potthoff, 220 Ind. 574, at page 582, 44 N.E.2d 494, at page 497 (1942), our Supreme Court stated that,

"* * * counties are political subdivisions of the state and that as such they have no vested or contractual rights in

the disposition of funds derived from general taxation therein which are superior to the public policy of the state as declared by the legislature."

In view of the *Potthoff* analysis, the exceptions noted above, standing alone, would not forestall the right of the General Assembly to repeal House Enrolled Act No. 1818 retroactively, since it could be successfully argued that a political subdivision of the State, such as the Mass Transportation Authority could not in and of itself acquire vested rights by virtue of legislative enactment.

[6, 7] The rationale of the *Potthoff* decision indicates that the grant to an agency of the State does not, and cannot, vest rights and can thus be retroactively and prospectively repealed by the General Assembly. House Enrolled Act No. 1115 of the 1969 General Assembly (Acts 1969, ch. 20) was, therefore, a legitimate and constitutional exercise of legislative power.

[8] This squarely raises the effect of our judgment[6] which preceded the action of the retroactive repealer.

In Columbus, C. & I. C. R. W. Co. v. Board of Com'rs of Grant County et al., 65 Ind. 427, at page 438 (1879), our Supreme Court was confronted with a very similar situation and the following rule of law was established at that time:

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[6] The judgment entered December 31, 1968, was a *final judgment*. In Logan v. Sult, 152 Ind. 484, at page 438, 53 N.E. 456, at page 458 (1899), our Supreme Court said, "* * * for all purposes other than the right of appeal, the judgment, as soon as entered, read, and signed in open court is final, and may be enforced by appropriate writ according to its terms."

In explanation of post-judgment proceedings, the Supreme Court in Rooker v. Fidelity Trust Co., 198 Ind. 207, at page 212, 151 N.E. 610, at page 612 (1926), said:

"It is settled by authority, that after a final decree upon a trial of the merits of the case, by which the rights of the parties are settled, such further orders or decrees that may be necessary will be made to carry into effect the very rights decided upon the trial of the merits of the case, and that court will hear and determine and establish by order or decree anything necessary, that may be auxiliary to, or in execution of, the final decree on the merits."

"We are very loth, as a rule, to question the constitutionality of a statute which has been deliberately enacted by the General Assembly, and has obtained the sanction of executive approval. We do not question, but we recognize with pleasure, the ability, the intelligence, the learning and the faithfulness to duty of the distinguished citizens who are chosen by the people, from time to time, to fill the legislative and executive departments of our State government. They, like the judges of our courts, are bound by their official oaths to support the constitution of the State."

And, further, at page 412,

"In what we have said, we do not question the power of the Legislature to enact general laws, regulating the practice in courts of justice, which may materially affect or change the decision of causes pending before the courts. *But it seems to us, that it is not within the power of the Legislature, by a special act, directed to a particular case then pending before the courts, to change the decision of that case.* Special legislation on such subject is prohibited by sections 22 and 23 of the fourth article of the constitution of this State." (Emphasis supplied.)

This precedent has been followed in Searey v. The Patriot & Barkworks Turnpike Co. et al., 79 Ind. 274 (1881), and Citizens State Bank of Carmel v. Perisho, 77 Ind. App. 70, 130 N.E. 857 (1921).

In *Searey* the Supreme Court, at pages 279-280 of 79 Ind., said:

"Without any extended examination or discussion of the question, we may say generally that we are of the opinion that the appellees, and especially the turnpike company, were bound and concluded by the judgment and decree of the court below, in the former suit, from enforcing the collection of said assessment of benefits, or any part thereof, from the appellants and their co-plaintiffs, or either of them, or from the property of either of them, until such judgment and decree were set aside, annulled or reversed, by due course of law. *It was*

not in the power of the General Assembly, while said judgment and decree remained in full force, to virtually dissolve and set aside the perpetual injunction thereby granted, and to authorize the collection from the appellants of the assessment of benefits, which, a court of competent jurisdiction had declared to be illegal and invalid. Columbus, etc., R. W. Co. v. Board, etc., 65 Ind. 427, on page 440, and cases cited." (Emphasis supplied.)

Collaterally, in Henderson, Auditor of State v. State ex rel. Moon, 58 Ind. 244 (1877), our Supreme Court held that where a controversy had *not* been reduced to judgment at the time the Legislature acted, jurisdiction was lost.

Relating the foregoing authorities to the instant case, the following analysis is required:

Plaintiff, Mass Transportation Authority of Marion County, Indiana, obtained, in this court, a judgment. Such judgment was entered of record on December 31, 1968. The effect of that judgment was to settle the respective interests of the parties to the suit. Subsequently, the General Assembly passed House Enrolled Act No. 1115 (Acts 1969, ch. 26), which we have just held was a legitimate exercise of legislative power. However, the application of House Enrolled Act No. 1115 with respect to the judgment in favor of the Mass Transportation Authority of Marion County, was invalid.

See: The Columbus, C. & I. C. R. W. Co. v. Board of Com'rs of Grant County, et al., *supra*; Searcy v. Patriot & Barkworks Turnpike Co., *supra*.

[9] To hold, as defendants urge, that the Act (House Enrolled Act No. 1115) prevailed in its application as to the judgment in favor of Mass Transportation Authority of Marion County would deprive the Mass Transportation Authority of its judgment by legislative action. The General Assembly cannot interfere with a judicial determination. Article 3, § 1, of the Constitution of the State of Indiana. Without a doubt, the General Assembly had every right to give prospective and retroactive effect to their leg-

islation, with the exceptions heretofore pointed out. However, the attempt to encroach upon the determination of a co-equal branch of government was an unwarranted and unconstitutional action by the General Assembly, and its application to the judgment of this court has no force and effect. It should be abundantly clear that this court has no intention of sacrificing that which the Constitution of this State guarantees to the judicial branch of government.

The court would emphasize that the application which it makes in this case with reference to the retroactive repealer applies only to this case and should not be construed as applying to any other case. This court will make appropriate application of the principles announced here when, and if, cases involving the same are before us.

III. SOVEREIGN IMMUNITY.

[10] Defendants assert in their brief entitled, "Brief in Support of Response to Order of this Court, November 19, 1969.", the following:

> "[T]his action is now an action to extract funds from the state treasury through use of state officers as nominal defendants, the State of Indiana being the real party defendant in interest."

Thus, defendants urge that this action should abate by reason of sovereign immunity.

In support of this proposition defendants cite Ford Motor Co. v. Dept. of Treasury of State of Ind., 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1944). Although the *Ford* decision held that where a money judgment is sought from a "subdivision" or "agency" or "department" of the State, and the State is the real party in interest, it is entitled to invoke its sovereign immunity, the United States Supreme Court stated that the court must look to the nature of the suit to determine whether it has been instituted against the State or against the individual officer. It is apparent from a review of the *Ford* decision that federal jurisdiction was predicated on an alleged violation of the 14th Amendment and the Commerce Clause of the Constitution of the United

States. The action was dismissed by the Supreme Court under the provisions of the 11th Amendment to the Constitution of the United States. The *Ford* decision is in no way binding upon this court in the instant case.

Reviewing the facts before us, there are a number of reasons for refusing to accept the defense of sovereign immunity.

In Ellingham v. Dye, 178 Ind. 336, 99 N.E. 1 (1912), our Supreme Court upheld most forcefully the right of the judicial branch to review the acts of the legislative and the executive to determine their constitutionality. This rationale is highly persuasive. It would be entirely illogical for one branch of government to exceed its constitutional authority and then declare its immunity from judicial review by reason of sovereign immunity. The *Ellingham* case is directed expressly to the ministerial functions of State officials which are governed by the Constitution or statutes.

Another argument in direct answer to the defense of sovereign immunity is based on the language of the removal statute itself. The statute indicates that it is specifically directed to actions of *public officials*, and not the State. The statute did not contemplate the State as a party to the action, and *ipso facto* the defense of sovereign immunity is not available.

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[7] "Original jurisdiction to restrain or enjoin any *public official*, from doing any act authorized by any act of the general assembly and to mandate any *public official* to do any act prohibited by any act of the general assembly is hereby conferred on the Appellate Court of Indiana. Said jurisdiction shall be invoked by the attorney-general's removal, pursuant to this act [§§ 3-2121—3-2131], of an action from the court in which it is filed, and thereafter the Appellate Court of Indiana shall have jurisdiction of all further proceedings in any case so removed. This grant of jurisdiction shall carry with it complete jurisdiction to hear and determine the entire action in which such relief is demanded; but if it appears to the Appellate Court of Indiana that there is no equity in the demand for injunctive or mandatory relief against any *public official*, the suit shall be dismissed with out prejudice as to the other relief demanded, or it may be remanded to the court from which it was removed, without making any adjudication not necessary to the denial of injunctive or mandatory relief." (Emphasis supplied.) Section 3-2121, *supra*.

The *waiver* theory is also persuasive. It would be at best unfair to permit the State to simply await the outcome of litigation and, if favorable, abide by it, and, if not assert sovereign immunity as a belated defense.

In State ex rel. v. Smith, 85 Ind.App. 56, at pages 61 62, 152 N.E. 836, at page 838, (1926), this court noted the following:

> "The state is the party and the auditor the relator. Under the circumstances of this case there was no offense, against the sovereign power of the state in making it a party to the action. Hogston v. Bell (1916), 185 Ind. 536, 112 N.E. 883. Having provided, as a means of collection, that its debt might be collected by the usual procedure of foreclosure in the circuit court, if appeared to this action, and without a suggestion that it might not be sued herein, it answered in denial and affirmatively, and filed a cross complaint, asking affirmative relief, thereby, by fair implication, consenting that it might be made a party to determine the priority of its lien, or as to whether its judgment had been satisfied in such foreclosure proceeding."

Notwithstanding the cogency and application of all of the above theories, the fact remains that, in the view of this court, the defense of sovereign immunity is simply not applicable in this case. Ellingham v. Dye, *supra*.

IV. SEPARATION OF POWERS.

[11] Defendants have generally raised the question of separation power because of what they allege is "* * * an attempt [by this court] to interfere with and direct the financial policy of the State of Indiana contrary to Article 3, § 1 of the Indiana Constitution."

[12] Such an evaluation of determinations and orders of this court is wholly erroneous. It is the proper and legitimate function of any court to authorize execution on its judgments. To deny it this right would be to deny the existence of the judicial branch of government. Rooker v. Fidelity Trust Co., *supra*.

Sitting as a trial court, this court has interpreted the law. From that interpretation as it applies to House Enrolled Act No. 1818, certain duties and responsibilities devolve upon certain public officials. The substance of these duties was created by the Legislature, not this court. The responsibilities established were created by the Legislature, not this court. The method of appropriation of funds under the Act was designed by the Legislature, not this court. To allege, in spite of these known facts, that this court is attempting to interfere with financial policy, is to exhibit a fearful lack of knowledge of law and its workings.

For a full understanding of the order of payment entered simultaneously with this opinion, the court deems it necessary to consider the constitutional and statutory provisions pertaining to appropriation and payment of State revenues.

Article 10, § 3, of the Constitution of Indiana reads as follows:

"No money shall be drawn from the Treasury, but in pursuance of appropriations made by law."

House Enrolled Act No. 1818, which became law in spite of the unconstitutional pocket veto, as determined by our judgment in this cause, complies with the requirements of Article 10, § 3, *supra*.

[13, 14] House Enrolled Act No. 1818 is in the strictest sense a revenue allocation amendment which provides for the allocation of revenues collected under the Inheritance Tax Act. (Acts 1931, ch. 75, as amended.) An *allocation* by law is an *appropriation* of revenues. See: Carr, Auditor et al. v. State ex rel. Coetlosquet, 127 Ind. 204, 26 N.E. 778 (1890). The fact is that House Enrolled Act No. 1818 simply amended the proportions to be allocated, but the procedure of allocation and appropriation remained essentially the same.

In Carr, *supra*, at page 210 of 127 Ind., page 780 of 26 N.E., our Supreme Court held that an appropriation can be implied from the circumstances and, further, quoted favorably from a California case (McCauley v. Brooks, 16

Cal. 11), to the effect that the funds, when appropriated, need not be in the treasury.

See also: Henderson, Aud'r. v. Board of Comm'rs of State Solders', etc., Monument, 129 Ind. 92, 28 N.E. 127; 13 L.R.A. 169 (1891);

Orbison v. Welsh, Governor et al., 242 Ind. 385, 179 N.E.2d 727 (1962).

There is no apparent limitation on the rule; and the appropriation, once made, is sufficient to authorize money to be drawn from the treasury under the Constitution. The language of House Enrolled Act No. 1818 expressly makes an appropriation and the constitutional requirement is met.

Article 6, § 1, of the Constitution of Indiana provides simply that the Auditor and Treasurer of the State "* * * shall perform such duties as may be enjoined by law; * * *."

1 R.S.1852, ch. 7, § 2, p. 146, Ind.Stat.Ann. § 49-1702, Burns' 1964 Repl., sets out the duties of the Auditor of State. Paragraph "Eighth" of the Act reads as follows:

> "Draw warrants on the treasurer for all moneys directed by law to be paid out of the treasury to public officers, or for any other object whatsoever, as the same may become payable, and every warrant shall be properly numbered."

Again, there appears no limitation on the ministerial obligation of the Auditor, once the money is "* * * directed by law to be paid out * * *" to draw a warrant on the Treasurer.

[15] Paragraph "Fifth" of this Act (§ 49-1702, *supra*) referring to examination and liquidation of claims against the State as cited by the defendants, is *not* applicable where, as here, the "claim" is for enforcement of a *valid* legislative enactment containing an *appropriation* and allocation of inheritance tax revenues.

Acts 1859, ch. 138, § 8, p. 227, as amended by Acts 1937, ch. 168, § 1, p. 873, Ind.Stat.Ann., § 49-1810, Burns' 1964 Repl., reads as follows:

"The auditor of state shall at no time draw a warrant upon the treasurer of state [1] *unless there be money in the treasury belonging to the fund upon which the same is drawn to pay the same*, [2] *and in conformity to appropriations made by law*, and [3] *on money actually in the treasury, subject to the payment of the same*; and the auditor of state shall enter upon his books the number, date, payee, and amount of every draft in favor of the treasurer of state, and properly charge and credit the same to the appropriate fund, so as to keep an exact debit and credit account with each particular fund in the treasury; and the auditor shall carefully file and preserve such claim as his voucher for issuing the warrant." (Emphasis and numbering supplied.)

Under the foregoing provision, the Auditor is confronted with three limitations on the ministerial function of drawing a warrant.

Acts 1931, ch. 75, § 14, p. 192, as last amended by Acts 1957, ch. 318, § 6, p. 936, Ind.Stat.Ann., § 7-2414, Burns' 1969 Cum. Supp., provides as follows:

"Each county treasurer shall make a report, under oath, to the state board of tax commissioners on the first days of January, April, July and October, of each year, of all taxes received by him in the three [3] months next preceding under this act [§§ 7-2401—7-2411, 7-2412a—7-2442], in resident decedents' estates, and credited to the state of Indiana, stating for what estate and by whom and when paid. The form of such report shall be prescribed by the state board of accounts. At the same time the county auditor shall issue his warrant payable to the treasurer of state for such inheritance taxes, interest and penalties as are due the state of Indiana complying with the provisions of section 7 [§ 7-2407] of this act, which warrant shall be stamped and countersigned by the county treasurer as required by law and transmitted to the state board of tax commissioners with his said report. The secretary of the board shall receipt and account for all warrants collected under the provisions of this act *and shall deposit the same when received with*

the state treasurer in a special account to be created and known as the Inheritance Tax Account. Quietus shall be issued by the auditor of state to the state board of tax commissioners at the close of each month upon terms and conditions established for similar boards or commissions. It shall be the duty of the state board of tax commissioners to audit the reports provided for by this section. Shortages, as disclosed by said audit, shall be reported to and promptly covered by county treasurers and auditors concerned by issuance of warrants for the balance due. Excess payments as disclosed by the audit of reports shall be refunded by the board in the manner set out in section 17 [§ 7-2117] of this act and not paid into the state board of tax commissioners. For all such taxes collected by a county treasurer and not paid into the state board of tax commissioners within thirty [30] days from the time herein required, he shall pay interest at the rate of ten [10] per centum per annum, for which he shall be personally liable." (Emphasis supplied.)

Acts 1925, ch. 28, § 1, p. 69, Ind.Stat.Ann., § 61-202, Burns' 1961 Repl., reads, in pertinent part, as follows:

"From and after the first day of October, 1925, in addition to the revenue which accrues to and is a part of the general fund of the State, as now provided by law, the general *fund* of the state shall consist of:

. . . . . .

"Seventh. All inheritance taxes collected under and pursuant to law." (Emphasis supplied.)

[16] The foregoing statutory provisions mandate the following procedure: All inheritance tax revenues are placed in the Inheritance Tax Account which is maintained as part of the general fund. The monies are then appropriated according to the allocation schedule contained in House Enrolled Act No. 1818.

It is apparent that two of three limitations on the Auditor's ministerial duty to issue a warrant established in § 49-1810, *supra*, are not problematical here for the following reasons:

1. The fund (the general fund) exists; and
2. The appropriation was made by law through House Enrolled Act No. 1818, as judicially determined by this court.

The third element necessary for the Auditor to perform the ministerial function is that there be "* * * money actually *in the treasury* subject to the payment of the same; * * *." (§ 49-4810, *supra*) (Emphasis supplied.)

[17] According to the statutes set out above, and the interpretation of their provisions as herein set forth, if the general fund, into which inheritance tax revenues are placed, has sufficient monies to pay the amount allocated by the Act of the General Assembly, then the Auditor is bound by law to draw a warrant for that amount on the Treasurer of State, who is bound by law to honor it.

We are aware of the complexity of the issues involved in this appeal and the official and public concern which has developed as a result of the judgment entered. For that reason we have made every effort to give full hearing to the issues raised by both sides to this controversy.

[18] It is fundamental to the continued existence of our constitutional form of government that controversies such as this be met within prescribed legal procedures, and that the traditional constitutional powers granted to the several branches of government be maintained separate and exclusive. It is not within the scope of the powers granted to the executive branch of government that it should sit as a super-judiciary to decide which laws and judicial determinations it will obey and which it will not. To hold otherwise, would be to deny meaning to the words of Article 3, § 1 of the Constitution of Indiana, which reads:

"The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; *and no person, charged with official duties under one of these departments, shall exercise any of the functions of another,* except as in this Constitution expressly provided." (Emphasis supplied.)

The defendants have, by oath, declared their willingness to obey and uphold the Constitution of this State, and that includes the protection of the doctrine of separation of powers.

In Ellingham v. Dye, *supra*, at page 408 of 178 Ind., page 27 of 99 N.E., Judge Cox, speaking for our Supreme Court, eloquently expressed the constitutional philosophy which binds us all:

"It is a part of appellant's contention that, as the general rule is that courts will not issue writs that are unavailing, injunction should not be decreed in this. For it is assumed by counsel that, the Governor being invested by the Constitution with supreme executive authority with control over the military forces of the state, the courts could not enforce the decree against the board of which the law makes him a member if he chose to disregard it. This consideration presents no reason for the court to refuse to exercise jurisdiction. It surely does not follow that compulsory action would be needed in aid of the writ. This is a government of laws, and all are amendable to it. To the courts the people have given the power, and charged them with the duty to declare what it is; and this duty cannot be lightly disregarded, however unpleasant and embarassing it may be. Without the aid of sword or purse, courts have met with little difficulty from disobedience of their decrees, and this has come equally from a generally conscientious discharge of duty by the courts and a respect for the law which is inherent in our people. Where the question presented to a court is a judicial question, it would be sheer, inexcusable cowardice and a violation of duty for it to decline the exercise of its jurisdiction because of a lack of power to enforce its decree if other agencies of government should refuse to comply with it. Moreover, we have no right to reflect on any officer of a co-ordinate department by entertaining the assumption that the law as declared by the courts, might be disregarded."

WHITE, J., not participating.

PFAFF, Chief Justice.

ORDER

It appearing to this Court that pursuant to Order of the Court made and entered on November 19, 1969, James O. Mathis, as Commissioner of the Indiana Department of State Revenue and Richard A. Green, as Inheritance Tax Administrator of the State of Indiana, did on the 20th day of November, 1969, file with the Clerk of the Supreme and Appellate Courts duplicate certified computations of the amounts deposited by Marion County, Indiana, in the Indiana Inheritance Tax Account of the General Fund of the State Treasury for the calendar years 1967 and 1968.

It further appearing that plaintiff, State of Indiana, on the relation of The Mass Transportation Authority, of Greater Indianapolis, a municipal corporation, did on December 2, 1969, file its Answer to Response to Order of This Court—November 19, 1969, which Answer accepts as true the certified computation hereinabove mentioned.

It is therefore ordered, adjudged and decreed that the Clerk of the Supreme and Appellate Courts transmit *instanter* a copy of said certified computation to Trudy Slaby Etherton, Auditor of the State of Indiana.

It is further ordered, adjudged and decreed that the said Trudy Slaby Etherton, Auditor of the State of Indiana, on or beforce December 22, 1969, draw and issue a warrant upon the General Fund of the Treasury of the State of Indiana for a sum equal to ninety percent (90%) of the amount so computed and certified and that she immediately present and deposit said warrant with the Clerk of the Supreme and Appellate Courts.

It is further ordered, adjudged and decreed that John K. Snyder, Treasurer of the State of Indiana, honor said warrant when called upon to so do.

It is further ordered, adjudged and decreed that the Clerk of the Supreme and Appellate Courts shall, upon receipt of said warrant, disburse the same as follows:

1. Said amount so deposited with the Clerk of the Supreme and Appellate Courts of Indiana shall be disbursed

by said Clerk to The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, less the amount to be disbursed to the attorneys of record for The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, in satisfaction of an attorneys' lien filed by said attorneys for the plaintiff on February 28, 1969.

2. The Clerk of the Supreme and Appellate Courts shall, upon receipt of the warrant representing ninety percent (90%) of State Inheritance Taxes remitted to the Indiana Department of State Revenue, Inheritance Tax Division, from Marion County, Indiana, which were deposited in the "Inheritance Tax Account" of the State Treasury for the period January 1, 1967, through and including December 31, 1968, disburse ten percent (10%) of said funds so remitted for the period beginning January 1, 1967, to and including December 31, 1967, to the attorneys of record for The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, which ten percent (10%) disbursement is in satisfaction of an attorneys' lien filed by the attorneys of record for the plaintiff herein on February 28, 1969.

It is further ordered, adjudged and decreed that a copy of this Order be served upon John K. Snyder, Treasurer of the State of Indiana; upon Trudy Slaby Etherton, Auditor of the State of Indiana; and upon Kendal E. Mathews, Clerk of the Supreme and Appellate Courts, by the bailiff of this court.

WHITE, J., not participating.

Appendix B1

STATE of Indiana on the relation of the MASS TRANSPORTATION AUTHORITY OF GREATER INDIANAPOLIS, A Municipal corporation, Plaintiff,

v.

INDIANA REVENUE BOARD, Roger D. Branigin, as a Member of the Indiana Revenue Board, John K. Snyder, Treasurer of State of Indiana, and as a Member of the Indiana Revenue Board, John P. Gallagher, Auditor of State of Indiana, and as a Member of the Indiana Revenue Board, Indiana Department of State Revenue, William L. Fortune, as Commissioner of the Indiana Department of State Revenue, the State Board of Tax Commissioners, Larry R. Mohr, Herbert C. Holmes, as Members of the State Board of Tax Commissioners of Indiana, T. Michael Smith, as Inheritance Tax Administrator, Defendants.

No. 767 A 39.

Appellate Court of Indiana.

En Banc.

Dec. 31, 1968.

Transfer Denied Feb. 6, 1969.

See 244 N.E.2d 111.

Original action to mandate members of revenue board and other officials to comply with statute pertaining to distribution of inheritance tax funds. The Appellate Court, Cooper, J., held that where bill containing emergency clause was properly authenticated by presiding officers of House and Senate and was presented to Governor on last day of legislative session and Governor failed to file same within five days with Secretary of State together with his objections thereto, bill became law without Governor's signature.

Judgment for plaintiff.

Faulconer, Bierly and Prime, JJ. dissented.

1. Statutes⇨34

Governor has no power to pocket veto legislation which has been enacted by the General Assembly.

2. **Constitutional Law** ⇨**45**

Courts may not ignore open and flagrant violation of constitutional provisions by those sworn to uphold and defend it.

3. **Statutes** ⇨**176**

Court in determining whether or not bill became law has duty to examine all sources of information which would clarify factual situation concerning the bill.

4. **Statutes** ⇨**34**

Bill providing for distribution of inheritance tax funds, which had emergency clause and which was properly authenticated by presiding officers of both House and Senate and which was presented to governor on last day of legislative session and which governor failed to file with Secretary of State together with his objections within five days became law without governor's signature. Laws 1967, House Enrolled Act No. 1818; Burns' Ann.St. § 7-2436; Laws 2nd Spl.Sess. 1965, c. 7; Const. art. 5, § 14.

5. **Statutes** ⇨**34**

When bill is received by governor, but not signed by him, nor vetoed and returned to House in which it originated, bill, when it contains emergency clause, will go into effect immediately after lapse of five-day period unless governor shall file such bill, with his objections thereto, in office of Secretary of State. Laws 1967, House Enrolled Act. No. 1818; Burns' Ann.St. § 7-2436; Laws 2nd Spec.Sess. 1965, c. 7; Const. art. 5, § 14.

6. **Courts** ⇨**100(1)**

Judicial decision concerning validity of procedure for enacting bills into law would not be given retrospective effect.

John Neff, Richard M. Givan, Indianapolis, for plaintiff, Lieber & Neff, Bowen, Myers, Northam & Givan, Indianapolis, of counsel.

John J. Dillon, Atty. Gen., Charles S. White, Chief Counsel, Indianapolis, Virginia D. McCarty, Deputy Atty. Gen., for defendants.

ORIGINAL ACTION

COOPER, Judge.

From the record now before us, it appears that the plaintiff filed a petition in the Superior Court of Marion County, Room No. 3, to mandate the defendants to comply with House Enrolled Act No. 1818, passed by the General Assembly during its 1967 Session. Specifically, the petition prayed that:

> "An order issued against Defendants, mandating them to administer and enforce the inheritance tax laws of Indiana as they now exist including the Acts of the General Assembly of Indiana, 1931, Chapter 75, Section 36, as amended by the 1967 General Assembly.
>
> "Plaintiff further prays that an order issued against Defendants, enjoining them from continuing to apply the taxes levied and collected under the inheritance tax law of Indiana according to the Acts of the General Assembly of Indiana, 1931, Chapter 75, Section 36, as it existed prior to its amendment by the 1967 Indiana General Assembly."

The trial judge granted a temporary restraining order. The Attorney General on behalf of the defendants, prior to the hearing date set by the Superior Court of Marion County, filed a petition to transfer the cause to this Court pursuant to Ch. 7, of the Acts of 1965, (2nd Spec.Sess.). After a hearing by this Court, sitting In Banc, on the petition to transfer, we assumed jurisdiction and transferred the cause to this Court and dissolved the existing restraining order.

The Attorney General, on behalf of the defendants, filed a demurrer to the complaint on the ground that it failed to state a cause of action. Subsequently we overruled the de-

murrer. Thereafter, both parties filed separate motions for judgment on the pleadings.

The sole question now before us to be decided is whether House Enrolled Act No. 1818 became the law of the State under the following circumstances.

House Enrolled Act No. 1818 amended Acts of 1931, Ch. 75, as amended, and Acts of 1947, Ch. 10, and provided for the distribution of inheritance tax funds on the basis of ten percent (10%) to the State and ninety percent (90%) to the Mass Transportation Authority of Marion County, the plaintiff herein.

If the bill became law, the relief prayed for in the petition should be granted. If it did not become law, judgment should be entered for the defendants.

The facts in this cause are undisputed and without conflict. The bill in question was duly passed in both Houses of the 115th General Assembly; duly signed by the respective officials of both the Senate and the House and presented to the Governor, with other bills, whose office gave a receipt therefor. This presentment was made on the last day of the 1967 legislative session. The Governor did not approve the bill by signing it and sending it to the office of the Secretary of State, nor did he send it to the office of the Secretary of State unsigned, nor did he return it with his objections thereto, as provided in Article 5, Section 14, of the Constitution of Indiana. Therefore, the bill was neither published nor distributed to the Clerks of the Circuit Courts of the several counties of the State by the Secretary of State with other bills.

It is agreed by all concerned that the bill is still in the Governor's office. Plaintiff contends that this bill became law after five days since it contained an emergency clause, pursuant to Article 5, Section 14 of the Constitution of Indiana, and the defendants contend that it did not, citing the last sentence of Article 5, Section 14.

Article 5, Section 14 of the Constitution of the State of Indiana reads as follows:

"§ 14. Bills signed or vetoed.—Every bill which shall have passed the General Assembly, shall be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it, with his objections, to the House in which it shall have originated; which House shall enter the objections, at large, upon its journals, and proceed to reconsider the bill. If, after such reconsideration, a majority of all the members elected to that House shall agree to pass the bill, it shall be sent, with the Governor's objections, to the other House, by which it shall likewise be reconsidered; and, if approved by a majority of all the members elected to that House, it shall be a law. If any bill shall not be returned by the Governor within three days, Sundays excepted, after it shall have been presented to him, it shall be a law, without his signature, unless the general adjournment shall prevent its return; in which case it shall be a law, unless the Governor, within five days next after such adjournment shall file such bill, with his objections thereto, in the office of Secretary of State; who shall lay the same before the General Assembly at its next session, in like manner as if it had been returned by the Governor. But no bill shall be presented to the Governor, within two days next previous to the final adjournment of the General Assembly."

The citizens of our State generally recognize, and our Courts judicially know, that the legislative and the executive branches of our state government have, for a period of years, disregarded the clear mandate of the Constitution which is the organic law of this State, concerning how bills passed by the General Assembly are to become law. We feel that the time has come for the judiciary to recognize and denounce this manifest departure from the mandates given to the legislative and executive branches of our government by our Constitution.

We judicially know that the Constitution of Indiana, in Article 5, Section 14, provides:

"no bill shall be presented to the Governor, within two days next previous to the final adjournment of the General Assembly."

We also judicially know that the common practice has flourished of presenting important and vital bills to the Governor within the last two days of the session, contrary to the constitutional prohibition, and that several of the recent governors have accepted such bills within the last two days of such sessions and in most cases acted upon such bills in the method provided by the constitution, and further, that bills have been presented after the legislature should have adjourned sine die within the term required by the constitution of the State of Indiana.

[1] Likewise, we also judicially know that for years, the executive branch of our state government has illegally and unlawfully pocket vetoed various bills which have been duly enacted by the legislature. For example, the legislative journals show that in the year 1965, there were 19 House and 10 Senate bills pocket vetoed; that in 1967, there were 14 House and 19 Senate bill pocket vetoed. There is no authority, either from the Constitution, or from a Supreme Court decision interpreting our Constitution, which gives the Governor the power to pocket veto legislation which has been enacted by the General Assembly.

We further judicially know that one of the greatest students of constitutional law that was ever privileged to sit on the Supreme Court of Indiana, the late Justice Gilkison, questioned the authority of the legislature to stop the clocks in the respective chambers of each house on the last day of each session, in his dissenting opinion in the case of State ex rel. Cline v. Schricker (1949) 228 Ind. 41, at page 49, 88 N.E.2d 746, 89 N.E.2d 547.

Thomas Paine in 1791, defined and explained a constitution of a republic thus:

> "A constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence; and whatever it cannot be produced in visible form, there is none. A constitution is a thing antecedent to government, and a government is only a creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government. It is the

body of elements, to which you can refer, and quote article by article; and which contains the principles on which the government shall be established, the manner in which it shall be organized, the powers it shall have, the mode of elections, the duration of parliaments, or by what other name such bodies may be called; *the powers which the executive part of the government shall have;* and, in fine, everything that relates to the complete organization of a civil government, and the principles on which it shall act, and by which it shall be bound. A constitution, therefore, is to a government, what the laws made afterwards by that government are to a court of judicature. The court of judicature does not make the laws, neither can it alter them; it only acts in conformity to the laws made; and the government is in like manner governed by the constitution."

[2] These same principles also apply today to our own state Constitution. When we, as Judges of an appeal court, have before us a case such as this, in which it appears that those in power, after having sworn to uphold and defend the Constitution have openly and flagrantly violated its provisions, we must not ignore such illegal actions and remain silent, for to do so would thereby condone such behavior, and we would be betraying the citizens whose rights and privileges under the Constitution we have sworn to protect.

If the Courts as the guardians of the rights guaranteed to the people by the constitution should ever relax their vigilance in enforcing the provisions of the Constitution and yield to the pressures of any groups having special interests, including officeholders in the legislative and executive branches of government, our present system of constitutional government would collapse.

In the volume, Constitutional Limitation, by Cooley, 8th Edition, Volume 1, page 355, Cooley makes the following statement concerning state constitutions:

"That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity, and is therefore the paramount law."

On page 81 of the same volume, we find the following statement:

"By the constitution which they establish, they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the State, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law."

Article 5, Section 14 of the Constitution of Indiana prescribes the duties of a Governor relating to all bills passed by the General Assembly that are received by him, regardless of when so received. It is to be noted that the Constitution does not prohibit the Governor from acting upon any bill received by him during the session. It necessarily follows that after the Governor receives any bill during the session, he must act upon it in one of the ways provided for by the Constitution, as hereinabove set forth.

The Constitution expressly states that if adjournment shall prevent the bill's return to the General Assembly, "it shall be a law, unless the Governor, within five days next after such adjournment, shall file such bill, with his objections thereto, in the office of Secretary of State."

It was stated in Opinions of the Attorney General, 1935, at pages 87 and 88 as follows:

"III.

"The Governor has five days next following the final adjournment of the General Assembly within which to consider and act upon enrolled bills presented to him on Monday, March 11, 1935. This is in accordance with the provisions of section 14 of Article 5 of the Constitution of the State of Indiana.

"IV.

"Enrolled bills presented to and duly received and receipted for by the Governor on either Saturday, March 9, 1935, or Monday, March 11, 1935, will become a law without the signature of the Governor unless the Governor shall sign the same or refuse to sign and file such

enrolled bill with his objections thereto with the Secretary of State within the five days next after the final adjournment of the Seventy ninth session of the General Assembly." (Author's note: A review of the legislative journal for 1935 shows that March 11, 1935, was the last day of the session.)

It has been held also that where an act is not approved by the Governor and the same takes effect by lapse of time by reason of his failure to return the same with his objections thereto, such Act, when it contains an emergency clause, as does House Enrolled Act No. 1818, the Bill we are now considering, will go into effect immediately upon the expiration of time given by the Constitution for the Governor to consider and return bills. Constitution of the State of Indiana, Article 4, Section 28; State ex. rel. White v. Grant Superior Court, et al., (1930) 202 Ind. 197, 211, 172 N.E. 897, 71 A.L.R. 1354; Staleup et al. v. Dixon, 136 Ind. 9, 35 N.E. 987; State of Indiana ex rel. Colbert v. Wheeler, 172 Ind. 578, 89 N.E. 1, 19 Ann.Cas. 834; Shutt v. State of Indiana ex rel. Cain, 173 Ind. 689, 89 N.E. 6.

Our Supreme Court has, in the case of State ex rel. Grant, supra, 202 Ind. at page 240, 172, N.E. 897, held that the last sentence of Article 5, Section 14, is an inhibition only on the legislature and is in no way binding upon the Governor. At no place in the Constitution is the Governor given the authority or power to pocket veto any bill or enactment of the General Assembly presented to him during a session, regardless of the time when it is presented to him.

In interpreting Article 5, Section 14 of our State Constitution, our Supreme Court has expressly stated in the case of Tarlton v. Peggs (1862) 18 Ind. 24, 25, the following:

> *"This provision was intended to prevent the possibility of the Governor withholding a bill and thus preventing its becoming a law."* (Our emphasis)

Also, in the case of State ex rel. White v. Grant Superior Court et al., (1930) 202 Ind. 197, 211 172 N.E. 897, 901 we find the following statement:

"The proceedings by the General Assembly and the actions of the Governor necessary for the passage of a bill and to make it a law are stated in the Constitution. *The necessary procedure, as thus stated by the organic law, may not be enlarged, curtailed, changed, or modified by any governmental authority.*" (Our emphasis)

The Court went on to state further on page 211, 172 N.E. on page 901 of the opinion as follows:

"This bill, after its passage and enrollment and presentation to the Governor, was not delivered by the secretary of state to the state printer, and it was not printed under authority together with the other laws passed by the General Assembly at its Seventy Sixth Session. This bill had in it an emergency clause to the effect that 'the same shall thereafter be in force from and after its passage, etc.' The Constitution by section 28, art. 4, provides that, where an emergency shall be declared in the preamble or in the body of the law, it is unnecessary for it to become a law, that it be published and circulated in the several counties of the state by authority. This section has been plainly interpreted by the court that a bill will become a law at the expiration of the time given to the Governor by the Constitution, to file the bill with the secretary of state, together with his (the Governor's) objections thereon, where the bill provides that an emergency exists for it to become effective upon its passage. State [ex rel.] v. Wheeler (1909) 172 Ind. 578, 588, 89 N.E. 1, 19 Ann.Cas. 834; Shutt v. State [ex rel.] (1909) 173 Ind. 689, 89 N.E. 6."

[3] Under the principles enunciated in the case of State of Indiana ex rel. Colbert v. Wheeler (1909) 172 Ind. 578, 89 N.E. 1, this Court, in determining whether or not the bill became law, had the duty to examine all sources of information made available to us by the parties which would clarify the factual situation concerning this bill. From this information, we find that the Governor accepted House Enrolled Act No. 1818 together with several other House Enrolled Acts which became law with the Governor's signature on the last day of the session. It is, therefore, clearly

established that the Governor did, in fact, accept this group of House Enrolled Acts, including No. 1818, the one in question.

[4] The Constitution does not give the Governor the authority to condifionally accept an act at any time. Therefore, we must hold that House Enrolled Bill No. 1818, which had an emergency clause, which was properly authenticated by the presiding officers of both the House and Senate, and was accepted by the Governor, who failed to file the same within five days with the Secretary of State together with his objections thereto, became the law of the State of Indiana without the Governor's signature. In support of the foregoing statement, see both the majority and the dissenting opinions in the case of Hendricks, Secry. etc. v. State ex rel. Northwest Indiana Crime Commission, Inc. et al., (1946) 245 Ind. 43, 196 N.E.2d 66.

[5] When an Act is received by the Governor, but not signed by him, nor vetoed and returned to the House in which it originated, such Act, when it contains an emergency clause, such as the one we are now considering will go into effect immediately after the lapse of the five day period provided for by the Constitution and become the law, unless the Governor shall file such bill, with his objections thereto, in the office of the Secretary of State.

[6] We are of the expressed view that what we have stated heretofore should have no retrospective effect. To do so, would produce an uncertainty concerning the fundamental law as it has existed in the past. Such uncertainty would no doubt result in utter chaos and confusion as to the validity and effect of past legislation. As a result, we believe that the holding of the case at bar should be applicable to the 95th session of the General Assembly and all sessions thereafter. In re Todd (1934) 208 Ind. 168, 193 N.E. 865; Swank et al. v. Tyndall et al., (1947) 226 Ind. 204, 78 N.E.2d 535; Johnson v. New Jersey (1966) 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882.

The plaintiff's motion for judgment is granted and the defendant's motion for judgment is denied.

Judgment is entered for the plaintiff with costs against the defendants.

CARSON, C. J., COOK, P. J., and PFAFF and SMITH, JJ., concur.

FAULCONER, J., dissents with opinion in which BIERLY and PRIME, JJ., concur.

NOTE: COOK, P. J., participated in the argument and the conferences thereafter and concurred in the majority opinion. His untimely death occurred before the final draft of this opinion was completed and delivered to the Clerk's office.

FAULCONER, Judge (dissenting).

Plaintiff filed a petition in the Superior Court of Marion County, Room No. 3, to mandate defendants to comply with House Enrolled Act No. 1818, passed by the General Assembly during its 1967 Session. Specifically the petition prayed that:

> "[A]n order issue against Defendants, mandating them to administer and enforce the inheritance tax laws of Indiana as they now exist including Acts of the General Assembly of Indiana, 1931, Chapter 75, Section 36, as amended by the 1967 General Assembly.
>
> "Plaintiff further prays that an order issue against Defendants, enjoining them from continuing to apply the taxes levied and collected under the inheritance tax law of Indiana according to the Acts of the General Assembly of Indiana, 1931, Chapter 75, Section 36, as it existed prior to its amendment by the 1967 Indiana General Assembly."

The trial judge granted a temporary restraining order, without notice, hearing or bond. The Attorney General of Indiana on behalf of the defendants, prior to the hearing date set by the Superior Court of Marion County, filed a petition to transfer the cause to this court pursuant to ch. 7 of Acts 1965 (2nd Spec.Sess.). After hearing on the petition to transfer by this court, In Banc, we transferred the cause to this court and dissolved the restraining order.

The Attorney General, on behalf of the defendants, filed a demurrer to the complaint on the ground that it fails to state a cause of action. Subsequently we overruled the demurrer. Thereafter both parties filed separate motions for judgment on the pleadings.

The only question before us in this cause is whether House Enrolled Act No. 1818 became a law.

House Enrolled Act No. 1818, amended Acts 1931, ch. 75, § 36, p. 192, § 7-2436, Burns' 1953 Replacement, and provided that inheritance tax funds should be distributed, 10% to the State and 90% to the Mass Transportation Authority of Marion County, plaintiff herein.

If the bill became law the relief prayed for in the petition should be granted. If it did not become law, judgment should be entered for the defendants.

The facts in this cause are undisputed and without conflict. The bill in question was duly passed in both Houses of the 95th General Assembly; duly signed by the respective officials of both the Senate and the House and taken to the Governor's office on the last day of the 95th Session of the General Assembly with other bills, which office gave an unsigned receipt therefor. The Governor did not approve the bill by signing it and sending it to the office of the Secretary of State, nor did he send it to the office of the Secretary of State unsigned, nor did he return it with his objections thereto, as provided in Art. 5, § 14, of the Constitution of Indiana.

This bill was neither published nor distributed by the Secretary of State to the clerks of the Circuit Courts of the several counties of the State with other bills.

It is agreed by all concerned that the bill is still physically in the Governor's office. Plaintiff contends that this bill became law after five days, pursuant to Art. 5, § 14, of the Constitution of Indiana, and defendants contend that it did not, citing the last sentence of Art. 5, § 14, supra, which reads as follows:

"But no bill shall be presented to the Governor, within two days next previous to the final adjournment of the General Assembly."

This case is governed by State ex rel. Owen v. Fortieth Judical Circuit (1934), 202 Ind. 354, 174 N.E. 423. The facts are strikingly similar and are set out at page 356 of 202 Ind., 174 N.E. at page 423, as follows:

"Senate bill No. 165 was passed by both houses and was properly signed by the presiding officer of each. On March 11, 1929 at 4:40 p. m. upon request of the Governor, the secretary of the senate delivered said bill to the office of the Attorney General for his opinion touching the legality thereof. That thereafter between 5 p. m. and 7 p. m. said senate bill No. 165 was, at the request of the Governor, delivered to the office of the Governor, and the Governor talked with various persons who were interested in said bill concerning the same.

"The final adjournment of the Seventy-Sixth Session of the General Assembly occurred at 12 midnight March 11, 1929.

"Said bill did not contain any emergency clause, neither was it published nor distributed to the clerks of the circuit courts of the several counties of the state, or declared by the Governor to be in effect as required by section 28, article 4, State Constitution, section 131 Burns' Ann.St. 1926, and section 246 Burns' Ann.St. 1926.

"Said Senate bill No. 165 was never approved by the Governor, neither was it returned with his objections. The bill was retained by the Governor and is still in his office."

Further, the court, in holding that the bill did not become law stated, at page 358 of 202 Ind., 174 N.E. at page 424, as follows:

"The bill here in question was presented or attempted to be presented to the Governor between 5 and 7 o'clock p. m. on the last day of the session. No official action was taken by him, neither was there any obligation imposed upon him to act, as the bill was not presented to him more than two days next previous to the final adjournment of the General Assembly. We therefore conclude that relatrix' petition for an alternative writ of mandate is insufficient and respondents' demurrer thereto should be sustained."

Plaintiff points out that House Enrolled Act No. 1818 contained an emergency clause and, therefore, became law at the expiration of five days, and cites State ex rel. White v. Grant Superior Court (1930), 202 Ind. 197, 211, 172 N.E. 897, 902, wherein the court stated that Art. 4, § 28 of the Constitution of Indiana provides that "where an emergency shall be declared in the preamble or in the body of the law, it is unnecessary for it to become a law that it be published and circulated in the several counties of the state by authority", and that "[t]his section has been plainly interpreted by the court, that a bill will become a law at the expiration of the time given to the Governor by the Constitution to file the bill with the Secretary of State, together with his (the Governor's) objections thereon, where the bill provides that an emergency exists for it to become effective upon its passage." However, in State ex rel. White v. Grant Superior Court, supra, the court determined that the bill was presented to the Governor on Saturday preceding the Monday the Legislature adjourned, and the court held Sunday was not excluded in determining the days. Therefore, the *Grant* case is not authority for the proposition of plaintiff that the emergency clause made the law effective after the expiration of five days.

The emergency clause would not have made House Enrolled Act No. 1818, presented to the Governor during either of the last two days of the session and retained by him without any further action on his part, a law by mere lapse of time. Such a clause serves merely to make law, properly presented under Art. 5, § 14 of the Constitution of Indiana, effective without publication.

"The last sentence of the same section, the one under consideration, applies only to the General Assembly, and is in no way an inhibition to the Governor to receive a bill if sought to be presented to him by the General Assembly, but has to do only as an inhibition and a restraint of power upon the General Assembly." State ex rel. White v. Grant Superior Court, supra. (1930), 202 Ind. 197, 210, 172 N.E. 897, 901.

To ignore the clear and plain language of the last sentence of Art. 5, § 14, supra, would be contrary to the well established fundamental rules of constitutional construction that no word or words shall be assumed to be mere surplusage.

I cannot agree that, the decision of our Supreme Court in Hendricks, Secry. etc. v. State N. W. Crime Comm. (1964), 245 Ind. 43, 196 N.E.2d 66, is authority for plaintiff's position. A reading of the two majority and one dissenting opinions discloses that said case involved only an interpretation of that part of Art. 5, § 14 of the Indiana Constitution reading "unless the general adjournment shall prevent its return;" and the issue of presentation of a bill "within two days next previous to the final adjournment" was neither raised, briefed, argued or considered by the court. However said decision does indirectly support my position in the present case. In Judge Achor's concurring opinion, at pages 54, 55 of 245 Ind., 196 N.E.2d at page 71 is the following language, "However, the Indiana constitution contains express and explicit provision that (*except as to bills sent to the Governor during the last two days of the session*) all bills passed by the Legislature and presented to the Governor but not signed by him must be returned to the Legislature for reconsideration."

Again, at page 60 of 245 Ind., 196 N.E.2d at page 74, Judge Achor states, "furthermore, any bill which is presented to the Governor (Except within the last two days of the session) must be returned to the next session of the Legislature for its action, notwithstanding the general adjournment thereof."

For the reasons above set forth, it is my opinion that House Enrolled Act No. 1818 did not become law without the signature of the Governor because it was presented, or attempted to be presented, to the Governor within the two-day limitation as set forth in the last sentence of Art. 5, § 14 of the Constitution of Indiana.

Plaintiff's motion for judgment therefore should be denied and defendants' motion for judgment sustained.

Therefore, In my opinion, judgment should be entered for the defendants, with costs against the plaintiff.

BIERLY and PRIME, JJ., concur.

Appendix B2

STATE EX REL. MASS. TRANSP. AUTH. v.
INDIANA REV. BD.
Cite as 244 N.E.2d 111

STATE of Indiana on the relation of the MASS TRANSPORTATION AUTHORITY OF GREATER INDIANAPOLIS, a Municipal Corporation, Respondent,

v.

INDIANA REVENUE BOARD, Roger D. Branigin, as a Member of the Indiana Revenue Board, John K. Snyder, Treasurer of State of Indiana, and as a Member of the Indiana Revenue Board, Indiana Department of State Revenue, of the Indiana Department of State Revenue, the State Board of Tax Commissioners, Members of the State Board of Tax Commissioners of Indiana, T. Michael Smith, As Inheritance Tax Administrator, Petitioners.

No. 767A39.

Supreme Court of Indiana.

Feb. 6, 1969.

Corrected Opinion Feb. 7, 1969.

Action to compel members of revenue board and other officials to comply with statute pertaining to distribution of inheritance tax funds. The Superior Court, No. 3, Marion County, Glenn W. Funk, J., granted a temporary restraining order. The cause was transferred to the Appellate Court which entered judgment for plaintiff, 242 N.E.2d 642. A petition to transfer the cause to the Supreme Court was denied, there not being majority of judges of Supreme Court participating in case in favor of granting petition to transfer.

Transfer denied.

Courts⇐220(20¾)

Petition to transfer cause to Supreme Court would be denied, there not being majority of judges participating in case in favor of granting petition to transfer.

John Neff, Richard M. Givan, Indianapolis, Lieber & Neff, Bowen, Myers, Northam & Givan, Indianapolis, of counsel, for respondent.

John J. Dillon, Atty. Gen., Charles S. White, Chief Counsel, Virginia D. McCarty, Deputy Atty. Gen., Indianapolis, for petitioners.

ON PETITION TO TRANSFER

PER CURIAM.

This action is before this court on petition to transfer from the Appellate Court. HUNTER and ARTERBURN, JJ., believe that transfer should be denied. DeBRULER, C.J., and JACKSON, J., are of the opinion that the transfer should be granted. GIVAN, J., did not participate in this case.

There not being a majority of those judges participating in this case in favor of granting the petition to transfer, it is denied.

Transfer denied.

GIVAN, J., not participating.

HUNTER, Judge.

The respondent filed a petition for a writ of mandate in the trial court to require the petitioners to comply with House Enrolled Act No. 1818 of the 1967 General Assembly. The cause was transferred to the Indiana Appellate Court, State ex rel. Mass Transportation Authority v. Indiana Revenue Board (1968), Ind.App., 242 N.E.2d 642, which entered a judgment for the respondent. The only dispute is as to whether said bill became a law, and, if it did, the judgment of the Appellate Court was correct, and the petition for transfer should be denied.

The bill was duly passed and signed by the proper officials of both Houses of the 95th General Assembly. It was presented to the Governor on the same day that the General Assembly adjourned its 1967 session. The Governor never acted on nor returned the bill to the Secretary of

State, and it has never been published nor distributed to the clerks of Circuit Courts by the Secretary of State. Respondent contends that the bill became law, by the Governor's inaction, five days after the legislature was adjourned. Petitioners contend that the bill did not become law and that the Governor of Indiana has the authority to exercise what is commonly known as a "pocket veto". Both parties agree that the dispute is to be decided by a proper interpretation of Article 5, section 14 of the Constitution of Indiana:

> "§ 14. Bills signed or vetoed.—Every bill which shall have passed the General Assembly, shall be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it, with his objections, to the House in which it shall have originated; which House shall enter the objections, at large, upon its journals, and proceed to reconsider the bill. If, after such reconsideration, a majority of all the members elected to that House shall agree to pass the bill, it shall be sent, with the Governor's objections, to the other House, by which it shall likewise be reconsidered; and, if approved by a majority of all the members elected to that House, it shall be a law. If any bill shall not be returned by the Governor within three days, Sundays excepted, after it shall have been presented to him, it shall be a law, without his signature, unless the general adjournment shall prevent its return; in which case it shall be a law, unless the Governor, within five days next after such adjournment, shall file such bill, with his objections thereto, in the office of Secretary of State; who shall lay the same before the General Assembly at its next session, in like manner as if it had been returned by the Governor. But no bill shall be presented to the Governor within two days next previous to the final adjournment of the General Assembly."

There are three provisions in the section which are most relevant to a determination of this question and which appear to be in conflict: (1) The requirement that every bill passed by the General Assembly be presented to the Governor, (2) The provision that no bill can be presented to the Governor in the last two days of the legislative session

(with no corresponding restriction on the General Assembly not to enact new legislation during this period), and (3) The provision that, if a general adjournment prevents a bill's return by the Governor, it becomes a law unless the bill and his objections thereto are filed in the office of Secretary of State within five days after the adjournment.

The present conflict is this: how are these three provisions to be applied to bills that are duly passed and authenticated by both Houses during the last two days of a legislative session. If the General Assembly elects to follow the first of these three provisions which directs that all bills, whenever enacted, shall be presented to the Governor, are they not thereby acting inconsistently with the second provision which states that no bills shall be presented to the Governor in the last two days of the legislative session? To make matters worse, suppose the legislature chooses to follow the first mandate, ignore the second, and present the bills to the Governor on the last day of the legislative session. The question then becomes: was there an effective presentment, and, if so, does the bill become law according to the third provision if the Governor fails to act on the bill within the next five days? This is the question facing this Court, and the only conclusion which is apparent from restricting one's view to the literal provisions of the section is that there is an apparent conflict in the language.

In interpreting this section, it becomes necessary for this Court to look to the history of its adoption particularly with a view toward discerning the intentions of the drafters of our present Constitution. This Court in another dispute involving this same section once declared:

> "If the meaning of a constitutional provision is doubtful, courts may examine the proceedings of the convention which framed the provision, to aid in its interpretation." Woessner v. Bullock (1911), 176 Ind. 166, 169, 93 N.E. 1057, 1058.

It seems remarkable that in view of this well-accepted general rule regarding the construction of constitutional provisions that this court has never previously cited nor referred to the proceedings of the constitutional convention

in any case involving the particular provisions here in dispute. For this reason we propose to review the proceedings of the Constitutional Convention of 1850 as regards the adoption of Article 5, section 14.

THE 1850 CONVENTION

The Constitutional Convention of 1850 appointed several committees to do most of its original drafting. Two of the most prestigious of these were the Committee on the Legislative Department and the Committee on the Executive. On October 31, 1850, the Committee on the Legislative Department submitted a proposal designated Section 19, which gave the Governor a veto power and provided that a two-thirds majority of the members of each house present was required to override this veto. The last sentence of section 19 read as follows:

> "If any bill shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, it shall be a law in like manner as if he had signed it, unless the General Assembly, by adjournment, prevent such return, in which case it shall be a law, unless sent back within three days after their next meeting." Journal of the Convention of the People of Indiana (Indiana Historical Collections Reprint, 1936) [hereinafter referred to as Journal] 169.

According to this provision, the Governor was given five days in which to act on a bill or it would become law, and, if, by adjournment of the General Assembly, the Governor was prevented from returning it to the legislature for their reconsideration, he was required to do so within three days of their next session. In any event, the Governor's failure to act would result in the bill's becoming a law. There was no authority granted to the Governor to pocket veto a bill after the General Assembly had adjourned.

A minority report was submitted by certain members of the Committee; the only difference between their proposal and section 19 was that the minority felt that only a simple

majority of all the members of each house should be required to override the Governor's veto. Journal, supra at 170-171. The last sentence of the minority report was identical to the last sentence in the majority report.

On that same day, the same Committee submitted section 20 to the Convention. This provision provided the Governor a veto power over joint resolutions "according to the rules and limitations prescribed in case of bills." Journal, supra at 171.

On the following day, the Committee on the Executive submitted a proposal to the Convention which was designated as section 22. Section 22 was similar to the legislative committee's section 19 and gave the Governor the power to veto a bill. There were two primary differences between the proposals recommended by these two committees:

(1) Section 22, similar to the majority report on section 19, only required a majority of all the members of each house to override a veto, and,

(2) The last sentence of section 22 read as follows:

"If any bill shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, the same shall be a law, unless the general adjournment prevents its return: in which case it shall be a law." Journal, supra at 180.

According to this provision, the Governor was required to act on a bill in time to return it to the current session of the General Assembly or it became a law notwithstanding his objections. If the General Assembly adjourned before the Governor had an opportunity to return the bill, he simply lost his power to veto it, and the bill became a law without his signature.

On this same day, the Committee on the Executive submitted section 23 which was identical to section 20 submitted by the legislative committee and gave the Governor the power to veto joint resolutions. Journal, supra at 180.

On December 13, the legislative committee's sections 19 and 20 were given a second reading. At that time, one of the

delegates realizing the duplication that had occurred in the reports of these two committees made the following motion regarding section 19.

> "This section, sir, properly belongs to another article. It belongs to the article reported by the committee on the executive department. This subject was referred to that committee by the Convention, and the committee have reported a sections which will come up for consideration at the proepr time. I therefore move that this section be laid upon the table." 2 Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana (Indiana Historical Collections Reprint, 1935) [hereinafter referred to as Debates] 1127.

Both sections 19 and 20 were tabled by the Convention apparently in deference to the corresponding proposals (sections 22 and 23) that had been submitted by the Committee on the Executive. Journal, supra at 432.

On December 26, section 22 came before the Convention for the second of its three readings. Two proposed amendments to the section were defeated. Then one Mr. Rariden, a delegate from Wayne County, moved to amend the section in a way which would seem to indicate that he had been given an incorrect copy of the committee's proposal. He moved to strike out the word "not" in the last line "so that if the governor were prevented, by the adjournment of the General Assembly, from sanctioning a bill which was sent to him for his signature, it should nevertheless be a law." 2 Debates, supra at 1322. The motion was an anomaly in that the last line of the section, as originally introduced, contained no negative and provided precisely what Mr. Rariden wanted. On the following day, this delegate withdrew his amendment and moved for an amendment which he felt would clarify this last sentence. The last sentence, as he wished to amend it, would have read:

> "If any bill shall not be returned by the Governor within time before the general adjournment for each house of the Legislature to act upon the same, it shall be a law notwithstanding." Journal, supra at 548.

In support of his amendment, Mr. Rariden made the following remarks:

"I desire to have this Convention understand what they are doing. I aver that this section, as it stands, enlarges the veto power four-fold. Let me direct the attention of gentlemen for a moment to what will be the condition of the Legislature hereafter. A section has been reported to us which provides that there shall be but one session in every two years, and we have adopted a section which provides that no law shall pass unless it have the sanction of a majority of all the members elected.

* * * * * * * * * * *

It is proper enough that the Governor should have the power to call upon the Legislature to re-consider a measure that they had passed. It would be but a salutary check upon hasty legislation to require them to reflect upon what they had done. But the provision contained in this section puts it in the power of the Governor to thwart and check the action of the legislative body altogether. * * * It is giving to the Executive the power, practically to defeat the action of the Legislature, and to avoid responsibility. He may keep a bill in his pocket, and he may say 'Oh I have been debating and reflecting upon it, and I cannot make up my mind,' and make out of his very delay an appearance of great regard for the public interest.

* * * * * * * * * * *

It is argued in favor of the section that it is intended to prevent the fraudulent action of members in holding back their measures until too late for the Executive to examine them and return them previous to the adjournment. Sir, if we suppose that the representatives hereafter are to be knaves, and the executive's business is to watch and restrain them; they should be dispensed with, and their functions vested in the Executive; they can be of no other use than to make trouble. Measures so withheld, and from such men, are unworthy of the sanction of the Executive as we may suppose, and must intend some wrong to the public. The hurry and confusion which pre-

vails at the close of the legislature has been hertofore a subject of complaint, and an excuse for Governors exercising the pocket veto; but it grew out of local legislation, a great mass of which was thrown upon the last days of the session.

* * * * * * * * * * *

Sir, I am opposed to it. * * * It will be in the power of the Executive at any time to defeat legislative action by merely keeping a bill in his pocket for more than five days." 2 Debates, supra at 1323 (our emphasis).

Following Mr. Rariden's remarks, several delegates debated the propriety of allowing the executive any veto power at all. Mr. Rariden then attempted to redirect the attention of the convention on his amendment.

"If no one else desires to speak upon the subject, I wish to reply briefly to the remarks of the gentleman from Posey, and the gentleman from Tippecanoe.

It does strike me that these gentlemen have avoided debating the question that is immediately before us. It is not the veto power, in the ordinary acceptation of the term, that I object to. What I oppose is the pocket veto. I do not wish to deprive the Executive of the right to assign his reasons for being opposed to the passage of a bill, or to prevent him from calling on the legislative body to exercise a sober second thought. I am not opposed to that.

* * * * * * * * * * *

I do not propose to prevent the Governor from reaching his veto and saying it shall not be a law until the Legislature goes over it again, rethinks upon it, and again acts. But it is the pocket veto that I am at war with.

* * * * * * * * * * *

The effect of my amendment, is to let the responsibility stare the Executive in the face. When a measure has been matured, and passed through all the forms of legislation, and sent to him for approval, let him understand that the measures, however fatal to the interests of the country, shall be a law, unless he acts upon it. His nonaction shall

confirm the action of the members. Let him act and approve, or assign his reasons against it, shall be a law.

* * * * * * * * * * *

My proposition is, that if the Governor does not return the bill, with his objections to it, in time for the two Houses of the General Assembly to act upon it, it shall be a law notwithstanding the veto.

* * * * * * * * * * *

My amendment does not strike out or limit the veto power proper. It is to abolish the improper and cowardly exercise of it." 2 Debates, supra at 1329-1330.

While Raridens' motion was pending, another delegate moved to require a three-fifths majority to override a veto. Both of these proposed amendments were tabled by the Convention in the same vote. After two other amendments to the section were defeated, Mr. Rariden, apparently as determined and misinformed as ever, again moved to amend the section by striking the word "not" from the last line, and this motion was defeated (possibly because it was such an anomaly.) The proposal was then engrossed by the convention for a third reading. Section 23, dealing with the veto power over joint resolutions, was also engrossed for a third reading without amendment. Journal, supra at 548-550.

On this same day, a delegate submitted the following proposal which was designated section 29:

"No new bill shall be introduced into either House of the General Assembly within three days before the day of a general adjournment, and no bill shall be presented to the Governor for his approval on the day of a general adjournment, or on the next preceding day." Journal, supra at 551.

The debate that followed the introduction of this new idea is particularly relevant to the case at bar:

"I fear, sir, that some difficulty may grow out of such a provision. We have adopted a provision to be inserted in the Constitution, and a very proper one it is, that the titles of all laws shall indicate the substance of such laws.

This prohibition upon the introduction of bills will prevent the possibility of either House taking up any thing that may have been forgotten or overlooked, and acting upon it at a late period of the session. I never yet seen a legislative body that did not, in the last days of the session, collect up a great many things which had been overlooked, not through any design to keep them back, but in consequence of members being otherwise occupied during the whole session.

* * * * * * * * * * *

Mr. Kelso moved to amend the amendment so as to provide that the Legislature may, by a majority of two-thirds, pass any law within the last three days of the session.

Mr. Edmonston. It seems to me, sir, that such a provision will not accomplish the object which the gentleman from Switzerland has in view. The amendment he proposes is, that the General Assembly may pass any law by a majority of two-thirds, on the last days of the session. This does not remedy the evil.

Mr. Kelso. I will change the amendment so as to make it read 'introduce and pass.'

Mr. Dunn of Jefferson. I am afraid we are carrying our restrictions upon the action of the Legislature too far. It may be proper to prescribe some such rule as that proposed by the gentleman from Lake.

'That the General Assembly should refrain from introducing any new matter within the last few days of the session; but they should have power to act upon that which may have been previously introduced. It might become necessary to remedy some defect in a bill that had been passed in a previous part of the session. It seems to me that we can as well trust this whole matter to the wisdom of the Legislature without any Constitutional provision. I therefore, move to lay the whole subject on the table.

The motion was agreed to, and the section and amendments were laid upon the table." 2 Debates, supra at 1332.

At least as regards its first introduction, a proposal limiting the ability of the legislature to act in the last few days immediately proceeding its general adjournment did not find favor with the Convention.

On the following day, section 22 was given its third and final reading. One delegate moved to recommit the entire section to the Committee on the Executive with instructions to limit the Governor's time to act on each bill to three days and to limit his veto power to permit only objections involving the constitutionality of the legislation. In support of his motion the delegate declared:

"I think then, sir, that this section is fraught with mischief. I understand that by it the Governor *may*, if he chooses so to do, pocket every bill passed within five days before the termination of the session. This is too great a power to be given to any one man. I am willing to see him have a *qualified* veto, and would be disposed to confer on him the right to return a bill, with his objections, provied they were confined to the constitutionality of the proposed measure, but I have great and insuperable objections to his interposing his veto upon any measure, merely upon grounds of expediency *alone*. I cannot but think that when any proposition has received the sanction of the immediate representatives of the people, who, coming fresh from among them, are presumed to be charged with their instructions and wishes, and enjoying their confidence, that it ought not to be outweighed or nullified by the arbitrary fiat of a single individual; and more especially when it is remembered that no law *can* be hereafter passed but by the vote of a majority of the members elect to the Legislature, and *that* confined to general subjects of legislation and gravely and formally expressed by ayes and noes, entered at length upon the journal. I believe that the exercise of the veto power, if thus guarded, might be productive of no mischievous results; but, on the contrary, might have a good effect. If

we restrict the right of the Executive to withhold a bill or resolution to *three* days instead of *five*, as proposed in the section under consideration it would not be so objectionable; still it would be leaving in his hands extraordinary power, which would be liable to great abuse.

In the Constitution of Kentucky it is provided that bills remaining in the hands of the Executive ten days unless returned within three days of the succeeding session, shall become laws. We cannot have that provision here, because of biennial sessions; and if the Governor pockets bills within five days preceding the end of the session, they remain there for two years. This, sir, I will never consent to, and I earnestly call upon the members of this Convention to remedy this evil before it is too late. (Original emphasis.) 2 Debates, supra at 1346.

Although the motion to recommit the proposal to the committee failed to pass, the delegate's remarks apparently had a telling effect on the convention, for when section 22 itself was voted upon by the Convention, it failed to pass, by a vote of fifty-five to fifty-five. Journal, supra at [illegible].

At this point in the Convention, there was no proposal pending or passed, which provided the Governor with any veto power over a bill, much less a pocket veto. The proposal which had been submitted by the Committee on the Legislative Department had been tabled in deference to section 22, and section 22 had been defeated.

At least according to the amount of debate, the major issue which had caused section 22 to be defeated seemed to be the failure of the Convention to find a compromise between two competing interests. On the one hand, a great number of delegates did not want to allow the Governor to be able to veto a bill without his having to resubmit it to the legislature. On the other hand, many delegates were apprehensive about providing that the veto power would be forfeited if not exercised before the adjournment of the General Assembly because they envisioned that the Governor might be presented several bills during the last few days

sons voting for and against the bill, shall be entered on the journals of each House respectively. If any bill shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, it shall be a law, in like manner as if he had signed it, unless the general adjournment prevents its return; in which case it shall be a law unless sent back within three days after their next meeting." Journal, supra at 559-560.

This motion was carried by the Convention so the proposal was to be returned to the committee pursuant to these instructions. Several other proposed amendments were defeated by the Convention, including:

(1) A proposal giving the Governor thirty days after adjournment to return a vetoed bill to the Secretary of State,

(2) A proposal requiring a three-fifths majority to override a veto,

(3) A proposal making the bill a law if not vetoed before the expiration of the current session, and

(4) A proposal providing that a new bill could not be introduced in either House within three days of the final adjournment.

These proposals had been debated prior to section 23's defeat, and the delegates were not willing to reinstate old problems. Thus, section 23 was returned to the Committee on the Executive with instructions to insert a provision giving the Governor a veto power in accordance with the 1816 Constitution. This proposal required the Governor to exercise his veto power within five days unless the general adjournment prevented the return of the bill "in which case it shall be a law unless sent back within three days after their next meeting."

On January 6, Delegate Morrison of the Committee on the Executive reported section 23 to the Convention; it had been amended according to the instructions given to the committee by the Convention. But, as soon as Mr. Morrison had finished the committee report, he moved to amend the section:

Mr. Morrison. Mr. President, it will be discovered by gentlemen, that the section just read is essentially, literally, and positively, the section contained in the old Constitution. And, inasmuch as that section, in my opinion, is not calculated to answer the purpose, as it ought to do, under the new regulations which we shall have to make, in reference to biennial sessions, I shall offer an amendment to it. I do not ask the concurrence of the Convention in that report, for the reason that I now move to concur in the adoption of the section, with an amendment, which amendment is, to strike out the section and insert the following, as a substitute in full.

The President. The Chair would remark to the gentleman from Marion, that there is no question of concurrence. The committee have amended the section under positive instructions from the Convention, and through their Chairman have reported the same back. The question will be upon its passage.

Mr. Morrison. Then, sir, I move that the section be recommitted, with the following instructions: 'provided that bills vetoed by the Governor, may be passed by a majority of all the members elected to the two Houses, to be determined by yeas and nays. Bills to become laws unless returned within three days, unless a general adjournment prevents a return, in which case it shall be a law, unless the Governor, within five days after such adjournment, shall file the same, with his objections, thereto, in the office of the Secretary of State, who shall lay the same before the General Assembly at its next session, for action, in the same manner as if it had been reported by the Governor.'

I will call the attention of the Convention to the alteration which I make. We provide, in the new section, that the Governor shall have but three days instead of five, at the close of the session, to consider bills presented to him. And there shall be no new bills presented to him during the two last days of the sessions, so that he will not be permitted to pocket a bill, but must decide upon it, one

way or the other. If he have not time to examine a bill and return it to the Legislature, previous to the close of the session, he can file it in the office of the Secretary of State, to be presented to the next Legislature, whether the session be a called or a regular one. By this means, there can be no skulking. So far as the veto power is concerned, under the operation of this provision, it will be nothing more than a mere revisory power — nothing but what can be controlled by a majority of the Legislature. Again, in regard to joint resolutions, the proposition contains simply a provision that all joint resolutions which require the signature of the Governor, shall go through the same formula as bills. That is sufficient to indicate to the Legislature, at all times, the course to be pursued in regard to resolutions of this character. I hope the Convention will re-commit, in order to make the change which I have suggested." 2 Debates, supra at 1447-1448.

It is interesting to note that, in the actual instructions proposed by Mr. Morrison, as recorded in the Journal or the Debates, there is no mention of a two day limitation on the presentment of bills to the Governor by the General Assembly. It is in Morrison's remarks to his proposed instructions that any mention of this two-day limitation first appears. Its purpose according to Morrison, was "so that (The Governor) will not be permitted to pocket a bill, but must decide upon it one way or the other." One delegate observed:

> "that he had no particular objection to the proposition, except that part of it which provided that no bill should be sent to the Governor during the last two days of the session. He did not see what use there was in having the legislature in session if it were not at liberty to send bills to the Governor for his approval, until the end of the session." 2 Debates, supra at 1448.

There was no further discussion or debate on this particular provision, and, after two amendments to Morrison's proposal were defeated, the Convention voted to recommit the section to the committee so that the new proposal could be adopted.

On January 23, Mr. Morrison reported section 23, as amended, to the Convention. The section then read as follows:

"Section 23. Every bill which shall have passed both Houses of the General Assembly, shall be presented to the Governor. If he approve, he shall sign it; but if not, he shall return it with his objections to the House in which (sic) shall have originated, who shall enter his objections at large upon their journals, and proceed to reconsider it. If after such reconsideration a majority of all the members elected to that House shall agree to pass the bill; it shall be sent, with the objections, to the other House, by which it shall likewise be reconsidered, and, if approved by a majority of all the members elected to that House, it shall be a law; but in such cases, the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered upon the journals of each House respectively. If any bill shall not be returned by the Governor within three days (Sunday excepted) after it shall have been presented to him, it shall be a law, in like manner as if he had signed it, unless the general adjournment prevents its return; in which case it shall be a law unless the Governor, within five days after such adjournment, shall file the same, with his objections thereto, in the office of the Secretary of State, who shall lay the same before the General Assembly, at its next session, for its action, in the same manner as if it had been returned by the Governor. But no bill shall be presented to the Governor within two days previous to the adjournment of the General Assembly. Every joint resolution, requiring the signature of the Governor, shall be presented to him, and before it shall take effect, be approved by him; or being disapproved, shall be re-passed by a majority of all the members elected to both Houses, according to the rules and regulations prescribed in case of a bill." Journal, supra at 750-751.

The convention, now apparently weary of debating this provision, suspended their rules requiring "yeas" and "nays" to be taken, passed the section without further discussion,

and referred it to the Committee on Revision, Arrangement and Phraseology. 2 Debates, supra at 1787. On February 6, this committee reported the provision back to the Convention as Art. 5, § 14 of the new Indiana Constitution. The section, as amended by the revision committee, was adopted by the Convention without discussion and became part of our 1851 Constitution.

From the vast proceedings and debates which occurred during the Convention, three conclusions may properly be gleaned as regards Art. 5, § 14.

(1) It was the expressed intention of the Convention not to allow the Governor a power to *permanently pocket veto* a bill even if an adjournment of the General Assembly prevented its return.

(2) The provision that prevented presentment of the bills to the Governor during the last two days preceding adjournment was introduced with the expressed intent of requiring the *Governor to act affirmatively* on each bill and was added to § 14 without debate or discussion.

(3) A provision preventing the General Assembly from enacting any new legislation during the last days of a legislative session did not meet with the approval of the Convention and was defeated on at least two different occasions.

COURT INTERPRETATIONS OF THESE PROVISIONS

The first case decided by this court involving the presentment of a bill within the last two days of a legislative session was Bender v. State (1876), 53 Ind. 254. In *Bender*, the Governor, though presented the bill within the last two days, had apparently approved the bill and filed it with the Secretary of State. The court held that the law in question was valid, *the late presentment notwithstanding*.

In arriving at their decision in *Bender*, the court *could* have reasoned that, since all bills must be presented to the Governor, and since there is no express restraint on the

General Assembly's actually enacting legislation during the last two days, the provision preventing a presentment to the Governor during the last two days was only a directive to the legislature and would not be grounds for declaring a bill invalid. Such reasoning *could* have been supported by the intent of the drafters of the provision as exemplified by the proceedings and debates at the Constitutional Convention. Such reasoning *could* have also found support in the practical construction of the provision apparently given by both the legislature and the Governor in treating the presentment as valid. A "practical construction" of the Constitution by the General Assembly "must and does have great weight with the court in deciding the constitutional question." State ex rel. White v. Grant Superior Court (1930), 202 Ind. 197, 208, 172 N.E. 897, 900, 71 A.L.R. 1354. The court was certainly aware that the effect of the decision was to make the validity of a law not dependent upon a strict adherence to the last sentence of Art. 5, § 14, at least where the Governor accepted and acted upon the late presentment.

The court chose, however, to justify its decision in *Bender* by using a different line of reasoning. Citing Evans v. Browne (1869), 30 Ind. 514, it declared that the court was without power to look beyond the enrolled act to ascertain whether it had been passed in conformity to the Constitution. In the *Evans* case, the defendant state auditor had contended that a particular bill had not become law and alleged that when the bill was passed by the House of Representatives, the House had failed to have a quorum of its members present and could not have voted on any bill according to a strict adherence to the Constitution. The court in *Evans* declined to look beyond "the enrolled act and its authentication" by the officers of each House to determine its constitutional validity. Using *Evans* as authority, the court in *Bender* concluded that it would not look behind the bill to see when the required presentment was made to the Governor.

Had the court in *Bender* stated, rather than implied, that a late presentment would not affect the validity of a law,

the question would probably have been settled and the present conflict avoided. Regardless of the reasoning employed by the *Bender* decision, it was cited for the proposition that a presentment in the last two days of a legislative session would not render a bill invalid. See Board of Com'rs of Madison County v. Burford (1883), 93 Ind. 383; Western Union Telegraph Company v. Taggart (1894), 141 Ind. 281, 40 N.E. 1051, 60 L.R.A. 671.

In State ex rel. Colbert v. Wheeler (1909), 172 Ind. 578, 89 N.E. 1, this court held that a Governor did not have to file a bill with the Secretary of State for it to become a law. In that case the bill in question had been presented to the Governor on March 8, and the legislature had adjourned on March 11. When the Secretary of State certified the "Acts of 1895", he indicated that the enrolled bill was "missing", and the court judicially noted that the enrolled act was not on file in that office. Under the circumstances, the court was compelled to look beyond "the enrolled act and its authentication".

> "It is evident that said Enrolled House Act No. 132 became a law unless the Governor vetoed the same as provided by said section 14 of article 5 of the Constitution, whether filed in the office of the Secretary of State or not." State ex rel. Colbert v. Wheeler, supra at 588, 89 N.E. at 5.

At this point the courts had held that a bill's being presented to the Governor in the last two days would not render the law invalid where the Governor signed and filed it with the Secretary of State and that the Governor's not taking any action and not filing a bill with the Secretary of State would not render a law invalid where a proper presentment had been made. How then could this last sentence of Art. 5, § 14 ever be invoked to lend support to a contention that the Governor of Indiana had a pocket veto where the drafters of the very provision relied upon had expressed an intention to allow the Governor no such power?

The only case attempting to answer this question is State ex rel. Owen v. Fortieth Judicial Circuit (1931), 202 Ind.

354, 174 N.E. 423, and this is the case most heavily relied upon by the petitioners in the case at bar. In that case, a bill was actually delivered to the Governor by the Secretary of the Senate on the same day that the 76th session of the General Assembly was adjourned. The bill was retained by the Governor and was never filed with the Secretary of State nor returned to the General Assembly. The court held that the bill had not become law.

The court attempted to distinguish *Bender* and the other cases which had held that a law was valid even though presented during the last two days of the session. It observed that in each of these cases:

> "the bills there questioned, were properly authenticated by the proper officer of each House, and had either been approved by the Governor or else he had deposited them with the secretary of state, without his approval. * * * [and] in the case at bar, the facts do not come up to the abovestated rule, in that the bill is not found in the depository designated by the supreme law." State ex rel. Owen v. Fortieth Judicial Circuit, supra at 357, 174 N.E. at 424.

The court apparently either overlooked or deliberately decided not to discuss State ex rel. Colbert v. Wheeler and other cases which had held that the validity of a law was not dependent on the filing of a bill with the Secretary of State. We can not consider this act to be a prerequisite to a bill's becoming a law; Art. 5, § 14 expressly provides that, when an adjournment prevents the Governor's returning a bill to the General Assembly, "it shall be a law, *unless* the Governor, within five days next after such adjournment, shall file such bill, with his objections thereto, in the office of Secretary of State * * *."

After attempting to distinguish the previous cases, the court justified its holding in two sentences:

> "The bill here in question was presented or attempted to be presented to the Governor between 5 and 7 o'clock [p. m.] on the last day of the session. No official action was taken by him, neither was there any obligation im-

posed upon him to act, as the bill was not presented to him more than two days next previous to the final adjournment of the General Assembly." State ex rel. Owen v. Fortieth Judicial Circuit, supra at 358, 174 N.E. at 424.

These two sentences, constituting the only positive reasoning for the court's decision, should be carefully scrutinized. We do not believe that anything can be proved by pointing out that no obligation was imposed on the Governor to act on the bill in question, for, regardless of when the bill is presented to a Governor, he has no constitutional obligation to act on it. It is for this very reason that Art. 5, § 14 provides that a Governor's inaction will result in a bill's becoming a law. We can find no justification for the holding in State ex rel. Owen v. Fortieth Judicial Circuit, and we find it in conflict with Art. 5, § 14, the intentions of the drafters of that provision, and the other decisions of this court. For this reason, we are of the opinion that the holding in that case should be overruled by this court.

We find no other cases directly related to the power of the Governor to pocket veto a bill presented to him on the last two days of a legislative session.

CONCLUSIONS

From the foregoing discussion, certain conclusions may properly be made as regards the power of the Governor to pocket veto a bill:

(1) No such power is expressly provided by the Indiana Constitution.

(2) Following well-established rules of interpretation, no such power should be implied unless to accommodate the unquestioned intentions of the framers of our present Constitution.

"The veto power is a restriction upon the legislative branch of the government and is in derogation of the general plan of government for the separation of powers. This power, therefore, must be strictly construed." Hendricks v. State ex rel. Northwest Indiana Crime Comm. (1963), 245 Ind. 43, 52, 196 N.E.2d 66, 70.

"* * * (W)e are dealing with a legislative enactment under a constitution which provides:

> "The Legislative authority of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives. * * *" Art. 4, § 1, Indiana Constitution.

Since the Indiana Constitution provision granting veto power of the Governor has been transferred from the Legislative branch of the government to the Executive branch of our government, it is merely a limitation on the power fundamentally vested in the Legislature. Such limitation should therefore be exercised only as it is expressed in clear and unambiguous terms within the constitutional provision itself." (concurring opinion) Hendricks v. State ex rel. Northwest Indiana Crime Comm., supra at 59, 196 N.E.2d at 73.

(3) From the proceedings and debates of the Constitutional Convention of 1850, it does not appear that the delegates wished to allow the Governor the power to pocket veto any legislation. In proposing the provision which ultimately became Art. 5, § 14 of the Indiana Constitution, Delegate Morrison announced to the Convention:

> "We provide, in the new section, that the Governor shall have but three days instead of five, at the close of the session, to consider bills presented to him. And there shall be no new bills presented to him, during the two last days of the sessions, *so that he will not be permitted to pocket a bill, but must decide upon it, one way or the other.* If he have not time to examine a bill and return it to the Legislature, previous to the close of the session, he can file it in the office of the Secretary of State, to be presented to the next Legislature, whether the session be a called or a regular one. *By this means, there can be no sulking. So far as the veto power is concerned, under the operation of this provision, it will be nothing more than a mere revisory power—nothing but what can be controlled by a majority of the Legislature.*" (Our emphasis.) 2 Debates, supra at 1447-1448.

(4) There is no previous case law which presents a sound basis for holding that the Governor has a pocket veto. The decision relied upon by the petitioners, State ex rel. Owen v. Fortieth Judicial Circuit, supra, presents no persuasive justification for implying such a power in derogation of the expressed intention of the framers of our constitution and should be overruled.

For all the foregoing reasons we believe the following interpretation must be given to Art. 5, § 14.

(1) There is no provision, express or implied, which prevents the General Assembly from enacting new legislation during the last two days of a legislative session.

(2) Legislation enacted during this two day period should be presented to the Governor in accordance with the first sentence of Art. 5, § 14.

(3) The last sentence of Art. 5, § 14, which declares no bill "shall" be presented to the Governor during the last two days of a legislative session should be interpreted as a directive to the General Assembly, and the Governor as regards legislation which *can* be presented prior to that time, but no law should be deemed invalid because a presentment was made during these last two days.

(4) There is but one way for a Governor to exercise a veto power in Indiana. If the legislature is still in session the Governor must return the bill with his objections to the House in which the bill originated within three days after it is presented to him. If an adjournment prevents such a return, the Governor must file the bill with his objections with the Secretary of State within five days after such adjournment. If a Governor fails to take any action on a bill that has been duly passed, properly authenticated and presented to him for his approval, the bill will become a law regardless of when the presentment shall have occurred.

Applying these interpretations to the case at bar, we believe House Enrolled Act No. 1818 became a law five days after the adjournment of the 95th General Assembly. It follows that the result reached by the Appellate Court

pertinent part as follows: "I will call the attention of the Convention to the alteration which I make. We provide, in the new section, that the Governor shall have but three days instead of five, at the close of the session, to consider bills presented to him. *And there shall be no new bills presented to him during the last two days of the sessions, so that he will not be permitted to pocket a bill, but must decide upon it, one way or the other.*" (Emphasis supplied.)

I call attention to Article 5 Sec. 14 of our present constitution and specifically to the last sentence thereof, which reads as follows: "BUT NO BILL SHALL BE PRESENTED TO THE GOVERNOR, WITHIN TWO DAYS NEXT PREVIOUS TO THE FINAL ADJOURNMENT OF THE GENERAL ASSEMBLY." (Captialized for emphasis).

The intent of the delegates to the 1850 constitutional convention to eliminate the pocket veto was indicated in the debates, the method by which that intent was to be accomplished was shown by the remarks of the delegate, Mr. Morrison. The adoption of that intent and method is shown by the last sentence of the preceding paragraph of this opinion.

Thus in the case at bar, the General Assembly of 1967, in the face of the intent of the framers of the constitution of 1852, in open defiance and violation of the clear and plain mandate of the constitution, with full knowledge of the consequences flowing therefrom, presented House Enrolled Act No. 1818 to the Governor on the last day of the 1967 session of the General Assembly. That act imposed no duty and no obligation on the Governor to take any action on House Enrolled Act No. 1818, nor did such act become law without the Governor's signature as the very act of presenting it within the proscribed time nullified it in toto unless the Governor did in fact sign such enrolled act and deposit the signed act in the office of the Secretary of State.

The Appellate Court majority opinion contains the following citation, and we quote therefrom: "In the volume, Constitutional Limitation, by Cooley, 8th Edition, Volume 1, page 355, Cooley makes the following statement concerning state constitutions:

"'That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity, and is therefore the paramount law.'"

On page 81 of the same volume, we find the following statement:

"'By the constitution which they establish, they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the State, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law.'"

I deem it unnecessary to further expand this opinion as the constitutional mandate is clear and the violation thereof by the 1967 General Assembly only too apparent, as are the consequences of such violation. This cause should be transferred to this Court, the erroneous judgment of the Appellate Court reversed, and said cause remanded thereto with instructions to sustain defendant's motion for judgment, all at the costs of the plaintiff.

DeBRULER, C. J., concurs.

GIVAN, J., not participating.

Appendix C

HOUSE ENROLLED ACT No. 1818

AN ACT to amend an act entitled "An Act to provide for a tax on inheritances, bequests, legacies, devises, successions, gifts and transfers of property in certain cases, repealing all acts or parts of acts in conflict therewith and declaring an emergency," by providing for the distribution of taxes levied to certain county and state funds.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. Acts 1931, ch. 75, s. 36 is amended to read as follows: Sec. 36. Ninety percent (90%) of the receipts from the inheritance tax imposed by this act which are deposited in the Inheritance Tax Account in the State Treasury pursuant to this act on and after January 1, 1967, shall be distributed to the general funds of the counties from which said tax was received: Provided, however, That the sum of five dollars ($5.00) may be allowed to prosecuting attorneys in each case wherein they are required to appear on behalf of the state under the provisions of Section 15 of this act, said fees to be taxed as part of the costs in case and to be paid by the person or corporation from whom the tax is due: Provided, however, That in any county containing a city of the first class in which there exists a metropolitan thoroughfare or mass transportation authority, created pursuant to statute, that county's share of such money shall be distributed to said authority, and that in any county containing two or more cities of the second class, ninety percent (90%) of the county's share of such money shall be dedicated to the construction and maintenance of community mental health centers, and the remaining ten percent (10%) of such money shall be distributed to the county general fund. On or before the last day of April, 1967, and thereafter, on or before the last day of July, October, January and April of each year, the Inheritance Tax Administrator shall certify to the Auditor of the State of Indiana the amount of tax deposited by each county during the preceding fiscal quarter. The Auditor of the State of Indiana shall thereupon issue warrants to the Treasurer of the State of Indiana ordering payment to the respective

county general funds or metropolitan thoroughfare or mass transportation authority or community mental health centers, as required by this section. Each county shall be paid ninety percent (90%) of the amount of inheritance tax deposited by it during the preceding fiscal quarter. All other revenue derived from the imposition and collection of the inheritance tax imposed by this act shall remain in the state treasury and be credited to the state general fund.

SEC. 2. Whereas an emergency exists for the immediate taking effect of this act, the same shall be effective on and after passage.

REPEAL OF HOUSE ENROLLED ACT 1818

CHAPTER 20

[H. 1115. Approved February 12, 1969.]

AN ACT to repeal House Enrolled Act No. 1818 entitled "An Act to amend an act entitled 'An Act to provide for a tax on inheritances, bequests, legacies, devises, successions, gifts and transfers of property in certain cases, repealing all acts or parts of acts in conflict therewith and declaring an emergency,' by providing for the distribution of taxes levied to certain county and state funds," passed by the 1967 Session of the General Assembly, but not published as law.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. The above entitled House Enrolled Act No. 1818 passed at the 1967 Session of the General Assembly is hereby specifically repealed retroactive to the date and time of its enactment.

SEC. 2. If any section, sentence, clause, phrase or word of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other applications or provisions of this act, as it is the intent of the General Assembly that the remainder shall have full force and effect.

SEC. 3. Whereas an emergency exists for the more immediate taking effect of this act, the same shall be in full force and effect from and after its passage.

MANDATE JUDGMENT SECTION

Burns' § 3-2205—"Notice of judgment—Enforcement. All defendants duly served with process, or notified by publication in such action, shall take notice of the judgment and mandate of the court therein, and shall promptly perform the mandate thereof; and obedience to such judgment and mandate may be enforced by attachment, and fine or imprisonment, or both. [Acts 1881 (Spec.Sess.), ch. 38, § 810, p. 240; 1911, ch. 223, § 5, p. 541.]"

AUDITOR'S WARRANT STATUTES
CRIMINAL STATUTE

Burns' §10-3715—"If the auditor of state shall draw any warrant upon the treasurer of state, unless there be money in the treasury belonging to the particular fund upon which such order is drawn to pay the same, and in conformity to appropriations made by law, he shall, on conviction, be fined not less than one hundred dollars [$100] nor more than one thousand dollars [$1,000], and be imprisoned in the county jail not less than one [1] month nor more than six [6] months. [Acts 1905, ch. 169, § 520, p. 584.]"

CIVIL STATUTES

Burns' § 49-1809—"The treasurer of state is expressly prohibited from paying any money out of, or transferring any money from, the treasury of state, except upon the warrant of the auditor of state; and the auditor shall examine, with care, every demand and claim presented for payment, and shall be satisfied that every claim is just, legal, and unpaid, before he shall allow, audit, or countersign it; and, for that purpose, may require the affidavit of the claimant, or other evidence; and he shall require every claim to specify the particular items of indebtedness, but when satisfied that any claim is just, legal and unpaid, and if there be money to the credit of the fund, and not before, the auditor shall issue his warrant on the treasurer for its payment out of the proper fund; and if there be money of such fund in the treasury when the warrant is presented, the treasurer shall pay it, but not otherwise; and when paid, the treasurer shall take a receipt therefor on the back, and shall cancel

the warrant with a canceling hammer, and shall register, file and preserve the same [Acts 1859, ch. 138, § 7, p. 227.]"

Burns' § 49-1810—"The auditor of state shall at no time draw a warrant upon the treasurer of state unless there be money in the treasury belonging to the fund upon which the same is drawn to pay the same, and in conformity to appropriations made by law, and on money actually in the treasury subject to the payment of the same; and the auditor of state shall enter upon his books the number, date, payee, and amount of every draft in favor of the treasurer of state, and properly charge and credit the same to the appropriate fund, so as to keep an exact debit and credit account with each particular fund in the treasury; and the auditor shall carefully file and preserve such claim as his voucher for issuing the warrant [Acts 1859, ch. 138, § 8, p. 227; 1937, ch. 168, § 1, p. 873.]"

Burns' § 49-1702—"Duties.—He shall: * * * Fifth. Examine and liquidate the claims of all persons against the state in cases where provisions for the payment thereof shall have been made by law; and when no such provisions, or an insufficient one, has been made, to examine the claim, and report the facts, with his opinion thereon, to the legislature; and no allowance shall be made to refund moneys from the treasury without his statement either for or against the justice of the claim. * * * [I.R.S. 1852, ch. 7, § 2, p. 146.]"

SUBSTITUTION OF PARTIES

Burns' § 2-227—"Death or disability of party—Transfer of interest—Abatement or continuance of action.—No action shall abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court, on motion or supplemental complaint, at any time within one [1] year, or on supplemental complaint afterwards, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may

allow the person to whom the transfer is made to be substituted in the action. [Acts 1881 (Spec.Sess.), ch. 38, § 23, p. 240.]"

Burns' § 2-228—"New party—Notice.—When a new party is introduced into an action as a representative or successor of a former party, such new party is entitled to the same notice, to be given in the same manner as required for defendants in the commencement of an action. [Acts 1881 (Spec.Sess.), ch. 38, § 848, p. 240.]"

REMOVAL STATUTE

Burns' § 3-2129—"Procedure and practice in Appellate Court—Service of papers—Fees—Lien of judgment.—Procedures and practices, including fees and costs, to the extent not otherwise provided in this act [§§ 3-2121—3-2131] and in the rules of the Appellate Court of Indiana, shall be governed by the existing statutes and the rules governing civil actions in circuit courts, as they may be amended. Process shall be issued by the clerk of the Appellate Court of Indiana and may be directed to the sheriff of any county, but any writ (including summons, subpoena, and all court orders and notices of hearing) may be served by any officer in the state now authorized by law to serve the process of any court and, when now permitted by law or when ordered by a judge of the Appellate Court of Indiana, by any competent person. Fees now required by law to be paid into any fund of the county, in the case of circuit court actions, when paid for services performed by a circuit or county officer, or other local officer, shall be paid into such fund of the officer's county. Clerk's fees shall be governed by rules of the Appellate Court of Indiana. A judgment of the Appellate Court of Indiana shall become a lien on real estate in any county only when a certified copy thereof is filed with the clerk of the circuit court for that county and entered in the judgment docket of that court. The clerk of the circuit court of each county where the judgment is so entered shall issue writs of execution thereon which shall be executed by the county sheriff, all in the manner now provided by law for circuit court judgments. [Acts 1965. (2nd Spec. Sess.), ch. 7, § 11, p. 28.]"

TERMINATION OF M.T.A.

Burns' § 48-9353—"Transportation powers.—On the effective date [January 1, 1970] of this act, the consolidated city and the department of transportation shall have the following powers, duties and obligations:

(a) All transportation powers, heretofore or hereafter conferred by law upon the common council, the board of public safety, the department of traffic engineering, the city traffic engineer, the parking meter department, the park department, and the department of off-street parking, of a city of the first class, or prior to such effective date of the first class city.

(b) All transportation powers heretofore or hereafter conferred by law upon the board of county commissioners, the county surveyor, the county highway department or the county council of the county.

(c) All the powers, obligations and duties of the mass transportation authority created by Acts 1967, c. 311 [§§ 36-3431—36-3455], and the metropolitan thoroughfare authority created by Acts 1963, c. 386 [§§ 36-3401—36-3420].

(d) The power to effect street lighting in the police special service district on its behalf, and elsewhere in the county on behalf of the department.

After such effective date, the mass transportation authority shall cease to exist as a separate municipal corporation. [Acts 1969, ch. 173, § 1003, p. 357.]"

Appendix D.

STATE OF INDIANA
OFFICE OF THE SECRETARY OF STATE

SECRETARY OF STATE

I, WILLIAM N. SALIN, *Secretary of State, of the State of Indiana, hereby certify that the following and hereto attached is a full, true and complete copy of* the Oath of Office of Trudy Slaby Etherton, Auditor of the State of Indiana, bearing filed date of December 3, 1968 *as the same appears on file, as the law directs, in this office.*

In Witness Whereof, I have hereunto set my hand and affixed the seal of the State of Indiana, at the City of Indianapolis, this 8th *day of* December, 1969.

WILLIAM N. SALIN
Secretary of State.

By .....
Deputy

FILED

Dec. 3—1968
William N. Salin
Secretary of State Indiana

STATE OF INDIANA
SS:
COUNTY OF————

I, *Trudy Slaby Etherton,* do solemnly swear that I will support the Constitution of the United States, the Constitution of the State of Indiana and that I will faithfully and impartially discharge my duties as *Auditor of State*
State of Indiana
to the best of my skill and ability, so help me, God.
Trudy Slaby Etherton

Subscribed and sworn to before me this *First* day of *December,* 1968.

Bette L. Seiger
Notary Public

My commission expires April 17, 1972.

IN MEMORIAM

CHARLES W. COOK, JR.

To the Chief Justice and Associate Justices
of the Appellate Court of Indiana:

Your committee reports the following memorial for Charles W. Cook, Jr., who was a member of this court at the time of his death on November 21, 1968:

Judge Cook was born in the City of Indianapolis in 1906. A lifelong resident of the Indianapolis area, he was graduated from School 60, Shortridge High School and the Indiana University Law School.

He practiced law in Indianapolis from 1929 until his election to the bench. During the 1927-1928 he served as a law clerk to the late Judges Willis E. McMahan and Charles F. Remy of the Appellate Court of Indiana. Most of his law practice was in the area of civil law. From 1929 to 1939 he was an associate, then a member of the firm of Bingham, Mendenhall and Bingham. From 1939 to 1949 he was a member of the firm of Bingham, Cook and Bingham, and in September, 1949, he became a member of the firm of Cook and Mendenhall.

Immediately prior to his election as Judge of the Appellate Court of Indiana he was associated with the firm of Bose, Buchanan, McKinney and Evans. Politically he was an ardent Republican, and for many years took an active interest in party affairs. He served on the speaker's bureau and in other capacities for the Indiana Republican State Central Committee, and was a delegate to the 1960 and 1964 Republican National Conventions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. 248

INDIANA REVENUE BOARD, ET AL.,
Petitioners,

vs.

STATE OF INDIANA, on the relation of the City of Indianapolis, as successor in interest to the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, and RICHARD M. GIVAN and JOHN F. NEFF,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

INDIANA REVENUE BOARD,
EDGAR D. WHITCOMB, Governor of the State of Indiana and as a Member of the Indiana Revenue Board,
JOHN K. SNYDER, Treasurer of the State of Indiana, and as a Member of the Indiana Revenue Board,
TRUDY SIABY ETHERTON, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board,
INDIANA DEPARTMENT OF STATE REVENUE
JAMES O. MATHIS, as Commissioner of the Indiana Department of State Revenue,
THE STATE BOARD OF TAX COMMISSIONERS,
JOSEPH D. GEESLIN, JR., CARLETON L. PHILLIPPE, and DURWOOD STRANG, as Members of the State Board of Tax Commissioners of Indiana,
RICHARD D. GREEN, as Inheritance Tax Administrator,

Petitioners,

vs.

STATE OF INDIANA, on the relation of the City of Indianapolis, as successor in interest to the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, and RICHARD M. GIVAN and JOHN F. NEFF.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA

The Petitioners, INDIANA REVENUE BOARD, EDGAR D. WHITCOMB, Governor of the State of Indiana and as a Member of the Indiana Revenue Board, JOHN K. SNYDER, Treasurer of the State of Indiana, and as a Member of the Indiana Revenue Board, TRUDY SLABY ETHERTON, as Auditor of the State of Indiana and as a member of the Indiana Revenue Board, INDIANA DEPARTMENT OF STATE REVENUE, JAMES O. MATHIS, as Commissioner of the Indiana Department of State Revenue, THE STATE BOARD OF TAX COMMISSIONERS, JOSEPH D. GEESLIN, JR., CARLETON L. PHILLIPPI, and DURWOOD STRANG, as Members of the State Board of Tax Commissioners of Indiana, RICHARD A. GREEN, as Inheritance Tax Administrator, pray that a Writ of Certiorari issue to review the Judgment and Opinion of the Appellate Court, entered in these proceedings by the Appellate Court of Indiana on December 16, 1969. Petition for Rehearing denied by the Supreme Court of Indiana without opinion on March 13, 1969.

OPINIONS BELOW

The Judgment and Opinion of the Appellate Court of Indiana, sitting as a Court of original jurisdiction in this case, entered on December 16, 1969, is reported at — Ind. App. —; and 253 N.E. (2d) 725, and appears at Appendix A, infra pp. 1 to 25.

JURISDICTION

The Judgment of the Supreme Court of the State of Indiana denying petition for rehearing on petition to transfer the Order & Decision of December 16, 1969 was entered herein on March 13, 1970. This petition for cer-

tiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C., Sec. 1257 (3).

PARTIES

As stated at p. 9, *infra*, in the Statement of the Case, the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, ceased to exist on January 1, 1970. Its apparent successor in interest is Respondent, City of Indianapolis, Richard M. Givan and John F. Neff, although not parties below, were granted judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, § 1:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 10, Sec. 3, Indiana State Constitution:

"Appropriations.—No money shall be drawn from the Treasury, but in pursuance of appropriations made by law."

Article 10, Section 1, Indiana State Constitution:

"Assessment and taxation.—The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law."

STATUTES

Although these petitioners do not request a constitutional construction of any statute there are various Indiana statutes that must be included in order that the questions here presented may be understood. These petitioners, therefore, submit at Appendix C pages 70 to 75 the following statutes:

House Enrolled Act No. 1818 Acts of 1967 General Assembly (never published), p. 70;
Ch. 20 Acts of 1969 repealing House Enrolled Act No. 1818 *id.* p. 71;

The section of the mandate statute dealing with mandate judgment Acts 1881 (Spec. Sess.) Ch. 38 § 819 as amended and found in Burns' Indiana Stat. § 3-2206, p. 72;

Acts of 1905 Chapter 169 Section 520 Volume 4, (1946 Replacement) Burns Indiana Statutes Annotated § 10-3715, p. 72;

Acts of 1859, Chapter 138, Sections 7 and 8 as amended and found in Volume 10, Part 1 (1964 Replacement) Burns' Indiana Statutes Annotated, Sections 49-1809, 49-1810, p. 72-73;

Acts of 1852, Chapter 7, Section 2 as the same appears in Volume 10, Pt. 1 (1964 Replacement) Burns' Indiana Statutes, Sec. 49-1702, (Item Fifth), p. 73;

The statutes dealing with substitution of parties Acts 1881 (Spec. Sess.) Ch. 38 § 23 and § 848 Volume 2 Pt. 1 (1967 Repl.) Burns' Ind. Stat. §§ 2-227, 2-228, p. 73;

Portion of statute providing for removal of cases to the Indiana Appellate Court Acts 1965 (2nd Spec. Sess.) Ch. 7, Volume 2 Pt. 2, (1968 Repl.) Burns' Ind. Stat. §3-2129, p. 74;

STATEMENT OF THE CASE

Stat. § 3-2129. This act provides that, in cases of state wide importance, the Attorney General of Indiana, in his discretion, may remove the same to the Indiana Appellate Court which hears the case as a court of original jurisdiction.

On December 27, 1968 the *dissenting* opinion of the Appellate Court upholding the validity of the "pocket veto" was filed. Appendix B1 pages 36 to 41. On December 31, 1968 the *majority opinion* of the Appellate Court holding the "pocket veto" to be invalid was filed. *State ex rel. Mass Transp. Auth. v. Indiana Rev. Bd.*, — Ind. App. —, 242 N.E. (2d) 642 (1968); Appendix B1 pages 25 to 36.

II

POST JUDGMENT PROCEEDINGS

On January 1, 1969, the personnel of the Appellate and Supreme Courts of the State of Indiana changed and the Judges elected in the November, 1968 election replaced four (4) of the eight (8) Judges on the Appellate Court. One of the Attorneys for Respondent, Richard M. Givan on the same date became one of five Judges on the Supreme Court and has abstained from all proceedings in this case.

Petition to Transfer was filed with the Supreme Court of Indiana on January 10, 1969 which was denied, two (2) judges voting for transfer with a written opinion, two (2) judges voting against transfer with a written opinion, Judge Givan abstaining. *State ex rel. Mass Transp. Auth. v. Indiana Rev. Bd.*, — Ind. —, 244 N.E. (2d) 111 (1969); Appendix B2, pp. 42 to 69 inclusive.

The Indiana legislature meets every two (2) years; the 1969 Legislature passed Chapter 20 Acts of 1969 which on February 12, 1969, the Governor signed into law, repealing House Enrolled Act No. 1818 retrospectively and declaring an emergency, meaning it took effect on the Governor's

signature. On February 28, 1969, Plaintiff filed its Verified Petition For Order For Payment Of Funds. Also, Plaintiff's Attorney, John F. Neff, filed a Verified Notice Of Intent To Hold An Attorney's Lien on behalf of himself and Richard M. Givan for ten per cent (10%) of the recovery realized for the year 1967.

Defendants filed their Motion To Dismiss Respondent's Verified Petition For Order For Payment of funds on April 11, 1969 and Respondents filed Answer to said Motion To Dismiss on April 21, 1969.

On October 21, 1969, the Court overruled the Motion To Dismiss, granted Plaintiff's Verified Petition For Order For Payment Of Funds and issued its mandate, as prayed for in the verified petition, ordering the Treasurer of the State to certify the amounts due Respondent to the Auditor of the State of Indiana and ordering the Auditor to draw her warrant. In this Order, the Court *sua sponte* substituted all of the Petitioners except John K. Snyder, Treasurer, as parties, in lieu of their predecessors in office. The Auditor of the State, Trudy Slaby Etherton, had been in office since December 1, 1968, thirty days before the decision of December 31, 1968.

An amended Order was issued on November 6, 1969 rescinding and correcting defects in the order of October 21, 1969.

These Petitioners attempted to transfer (appeal) the order of November 6, 1969, to the Indiana Supreme Court said transfer being denied when Judge Givan abstained, two voted for transfer and two against transfer. Petitioners also filed a motion for a new trial which was dismissed and expunged from the record by order of the Appellate Court. The Appellate Court also ordered that the Response of the Auditor of the State of Indiana addressed to the order of

November 6, 1969 showing she had been in office prior to judgment and had never received a notice or hearing be stricken and expunged from the record as a sham pleading on the same day it was filed, November 19, 1969. (The Docket Book record of filing the latter pleadings was in fact crossed out.)

When the Petitioner John K. Snyder, Treasurer, to whom the first portion of the mandate was directed, as prayed by Respondent and ordered by the Court, showed by verified response that it was impossible for him to comply with said mandate, the order of November 6 was replaced by an order of November 19, 1969 completely different in terms and in its requirements of these Petitioners. This action was on the Court's own motion and without any request from Respondent.

The Order of November 19, 1969 required all Petitioners to compute the amount due to the Respondent under House Enrolled Act No. 1818 or to file verified responses showing that they did not have the records necessary to make this computation.

The appropriate figures were filed by the Inheritance Tax Administrator. And on December 16, 1969, again without an additional request, a new and different order of mandate was issued directing the Auditor to draw her warrant in favor of Respondent. Appendix A p. 23. At the same time, the Appellate Court issued a written opinion dealing with some of the questions presented by these Petitioners in response to the three (3) previous orders. Opinion at Appendix A. pp. 1 to 22, inclusive.

Petitioners filed their Petition To Transfer to the Indiana Supreme Court on January 5, 1970, and it was denied without opinion on February 3, 1970. Petition for Rehearing filed on February 24, 1970 was denied without opinion on

March 13, 1970. Both petitions were denied with Judge Givan abstaining, two voting for transfer and two against transfer.

On December 23, 1969, the Respondent filed a Verified Information And Affidavit For Rule To Show Cause. The Rule was issued and on February 26, 1970, Truly Slaby Etherton, Auditor, was found guilty of contempt and committed to the Sheriff to be held in the Marion County Jail. On March 4, 1970, the Auditor, under protest issued her warrant for $12,737,338.97 to the Clerk of the Supreme and Appellate Courts and purged herself of contempt.

The contempt proceedings will be brought forward by separate Petition for Certiorari.

On January 1, 1970, the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, herein referred to as MTA, was terminated as a corporate entity. Acts 1969 Ch. 173, Sec. 1003; Burns' Ind. Stat. § 48-9353. Since that date the case has been continued by the Court as though said corporation, MTA, still existed. Respondent has asked for substitution of a proposed successor and Petitioners have objected to proceeding without a Relator competent to maintain the action.

The recipients of the money paid by the state on March 4, 1969 are City of Indianapolis, $11,909,752.60, and Richard M. Givan and John F. Neff, $827,586.57. Since these are the recipients of the money paid, they are joined as respondents.

This Petition covers the proceeding to and including the Judgment and Opinion of December 16, 1969, the petitions for transfer and rehearing of the Judgment and Opinion, and the denial of these petitions by the Supreme Court.

III

HOW THE FEDERAL QUESTIONS WERE RAISED

1.

The opinion of December 16, 1969, giving the ruling of the Appellate Court (trial court) with reference to the ineffectiveness of a retroactive repeal of an appropriation act and the newly announced doctrine that sovereignty had been waived by the participation of state officials as defendants, along with the Supreme Court's tacit approval by denial of transfer, made it clear, for the first time, that the mandate order of December 16, 1969 would be enforced as a money judgment to favor one county to the prejudice of the ninety-one (91) other counties.

The equal protection question was first presented to the Supreme Court on February 24th, 1970 in "Petition for Rehearing."

2.

The due process question of notice and hearing under the United States Constitution as to all defendants was presented to the Indiana Appellate Court as trial court in a Motion for New Trial filed on the 14th of November, 1969; also, as to Trudy Slaby Etherton in the Response of Trudy Slaby Etherton, Auditor, to the Order of November 6th, 1969 filed on the 19th of November, 1969. Both of the above pleadings were stricken from the record on November 19th, 1969.

The due process question under the United States Constitution was presented to the Indiana Supreme Court on February 24, 1970 in a Petition for Rehearing with Brief, which was denied.

3.

Lack of due process in the entire proceedings under the Fourteenth Amendment to the United States Constitution

was first raised on Petition for Rehearing, with Brief, filed on February 24, 1970 seeking transfer of the Order and Opinion of December 16th.

QUESTIONS PRESENTED

1. Whether the Appellate Court's (trial court's) Mandate of December 16, 1969 directing Petitioners to distribute money from the general fund, pursuant to repealed House Enrolled Act No. 1818, which mandate, in operation and effect, applied only ten per cent (10%) of the Inheritance Tax assessed and collected in Marion County in 1967 and 1968 to state purposes but applied 90% of the Inheritance Tax assessed and collected in the ninety-one (91) other counties in 1967 and 1968 to state purposes is repugnant to the equal protection clause of Sec. 1 of the Fourteenth Amendment to the United States Constitution?

2. Whether the Appellate Court's (trial court's) Mandate of December 16, 1969, with full knowledge of Respondent's failure to (1) give notice to Trudy Slaby Etherton as Auditor of the State and (2) cause her substitution as a party defendant with opportunity for hearing prior to judgment as required by Indiana law, is repugnant to the due process clause of Sec. 1 of the Fourteenth Amendment of the United States Constitution?

3. Whether (A) the actions of the Indiana Appellate Court in (1) entering the so-called judgment on December 31, 1968 instead of shortly after the vote referred to in a foot note to said Opinion; (2) entering said judgment against John P. Gallagher as Auditor one month after his term of office had terminated and the term of Trudy Slaby Etherton had commenced; (3) joining said Trudy Slaby Etherton and other Petitioners *sua sponte* more than nine months after judgment; (4) refusing to allow Trudy Slaby

Etherton to be heard on the constitutionality of House Enrolled Act 1818 under the State Constitution; (5) striking the Verified Response of Trudy Slaby Etherton on November 19, 1969, (a few hours after its filing) in which she set up the facts as to when her term of office started and John P. Gallagher's terminated, and that she had not been served with notice or given a hearing on the merits; (6) after entering mandate, as requested by Respondent, *sua sponte* without evidence including a judgment in favor of Respondent attorneys, rescinding same, at Respondent's request, to issue a new mandate, with a judgment for Respondent attorneys, in conformity with Respondent's desires; when this proved wrong, *sua sponte*, without notice or request, issuing two additional successive mandates continuing to include a judgment for Respondent attorneys and containing terms inconsistent with each other and with the Respondent's prayer displays such judicial bias and partiality as to deny Petitioners due process; (B) together with Petitioners inability to obtain judicial review, other than denial of transfer (two judges for transfer, two judges opposed and Judge Givan abstaining) constitutes a proceedings repugnant to the due process clause of the Fourteenth Amendment?

REASONS FOR GRANTING THE WRIT

Not since the days of *Marbury v. Madison*, 1 Cranch 137 (1803) has there been a more unique confrontation dealing with the interpretation of constitutional separation of powers.

This court has resolved separation of powers in the area of public rights by the exercise of judicial restraint. Holding that public rights would be controlled by the congress even though by repeal or a curative act a judgment of this

court would be nullified. *Hodges et al v. Snyder et al.*, 261 U.S. 600 (1922).

Confusion reigns among the state decisions. A majority seem to follow the lead taken by this court. 171 ALR 1353.

The final court of appeal in each state must exercise restraint in interpreting its own powers with reference to rulings on legislative and executive acts if the constitutional separation of powers is to continue and not be negated by unchallenged judicial decrees.

It is not often that the operation and effect of a judicial decree so patently prefers the citizens in one geographic section of a state over the citizens of the balance of the state and thus violates the principles of the equal protection clause of the 14th Amendment.

This case could serve as an opportunity for valuable instructions and guidelines in this area.

The Appellate (trial) Court's judgment ordering the Auditor to issue her warrant, even though the Act making the appropriation and establishing the fund had been repealed, questions the integrity of Article 10, Section 3 of the Indiana Constitution and draws in question the power of the Legislature to control the Auditor's warrant under said Article 10, Section 3 by the following statutes; Burns' Ind. Stat. §§ 49-1702, 49-1809, 49-1810, and the Criminal Statute, Burns' Ind. Stat. § 10-3715.

Because of the precedent set in this case, the task of budgeting and providing sufficient funds for legitimate state purposes will be complicated by the uncertainty as to a trial court's being willing to abide by said Article 10, Section 3, and the statutory inhibitions controlling the issuance of the Auditor's warrant.

1. The decision below conflicts with the equal protection principles set out by this Court in *Raymond v. Chicago Traction Co.*, 207 U.S. 20 (1907).

In *Raymond, supra*, at pages 36 and 37, this Court assumed jurisdiction to see that a taxpayer, who was unfairly treated by a state agency through discriminatory assessment of taxes, was not deprived of his Constitutional guarantees under the Fourteenth Amendment. In that case, this Court declared that the equal protection clause of the Fourteenth Amendment would protect the taxpayer suffering such discrimination.

The same protection was extended in *Home Tel. and Tel. Company v. Los Angeles*, 227 U.S. 278 (1913). There are other cases dealing with this same question but they all stand for this proposition:

> State action which operates unequally so as illegally to favor one taxpayer, or single class of taxpayers, to the prejudice of all others or illegally to discriminate against one taxpayer or a single class of taxpayers to the benefit of the many is repugnant to the equal protection clause of the Fourteenth Amendment and entitled to review.

The Court below established House Enrolled Act 1818 as a valid law on December 31, 1968, two years after the enactment and veto of said act, and found Respondent entitled to a mandate. Said Act provided that 90% of the State Inheritance Tax assessed and collected in a county would be used by that County for local purposes. Citizens in each county would enjoy a lower tax rate or receive greater local benefits for the same local rate.

The State Legislature repealed House Enrolled Act 1818 retroactively on February 12, 1969, which repeal has been held constitutional and valid, by the trial Court, in all

respects except as to Respondent's rights to mandate, its share of the tax money.

The unequal treatment is clearly spelled out in the lower Court's decision of December 16, 1969. That court's position that the repeal although valid was an encroachment on the judiciary is as follows:

> The rationale of the Pothoff decision indicates that the grant to an agency of the state does not, and cannot, vest rights and thus can be retroactively and prospectively repealed by the General Assembly. (Acts 1969, ch. 20) House Enrolled Act No. 1115 of the 1969 General Assembly was, therefore, a legitimate and constitutional exercise of legislative power.
>
> This squarely raises the effect of our judgment which preceded the action of the retroactive repealer. (Appendix A, p. 11.)
>
> * * *
>
> Plaintiff, Mass Transportation Authority of Marion County, Indiana, obtained, in this court, a judgment. Such judgment was entered of record on December 31, 1968. The effect of that judgment was to settle the respective interests of the parties to the suit. Subsequently, the General Assembly passed House Enrolled Act No. 1115 (Acts 1969, ch. 20), which we have just held was a legitimate exercise of legislative power. However, the application of House Enrolled Act No. 1115 with respect to the judgment in favor of the Mass Transportation Authority of Marion County was invalid. (Appendix A, p. 13.)
>
> * * *
>
> * * * However, the attempt to encroach upon the determination of a co-equal branch of Government was an unwarranted and unconstitutional action by the General Assembly, and its application to the judgment of this Court has no force and effect. It should be abundantly clear that this Court has no intention of sacrificing that which the constitution of

> this state guarantees to the judicial branch of Government. (Appendix A, p. 14.)

The Court's Order and Opinion awarding $12,[illegible] to the Respondent, City of Indianapolis, assures most of the citizens of Marion County of a lower tax rate, for the same local benefits, than the other counties in the State of Indiana. This Court has often held that judicial action is State action which will be reviewed when repugnant to the equal protection guarantee of the Fourteenth Amendment. Most recently, in *Shelley v. Kraemer*, 334 U.S. 1, p. 18 (1947), this Court held:

> The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

One of the substantial reasons for granting this Writ is that the citizens of the ninety-one (91) counties in Indiana who did not have judgments at the time of the repeal need the protection of this Court or will have no opportunity to assert their opposition to the unequal treatment they receive under the Court's decree. It is, therefore, fitting that these Petitioners seek the reversal of the decision of December 16, 1969 on their behalf. These State Officers are qualified to raise these questions in this Court.

In *Hopkins Federal Savings and Loan Association v. Cleary*, 296 U.S. 235, 240 (1935), this Court held that the

appropriation act is an "unwarranted and unconstitutional" encroachment on a determination of the Judicial branch. The judgment must stand and be enforced, says the lower Court, even though it affects only public rights in public money in favor of a public corporation against the State, which created it.

The general rule is that when the legislature has the power to adopt such a statute in the absence of a judgment, the entry of a judgment does not convert the exercise of legislative functions into the exercise of judicial functions, even though the effect of the statute is to impair the judgment or render it ineffective. *Schneck v. Jeffersonville* 152 Ind. 204, 52 N.E. 212 (1898), *Hodges et al. v. Snyder et al.*, 261 U.S. 600 (1922).

Since February 12, 1969, the date when House Enrolled Act 1818 was repealed, there has been no appropriation, and the fund provided for in House Enrolled Act 1818 no longer existed. The Auditor's authority from the legislature required by Article 10, Section 3 of the Indiana Constitution was no longer in existence.

The Auditor, since the repeal, not only had no authority by law to draw a warrant as required by said Article 10, Section 3 and authorized by House Enrolled Act 1818 but was forbidden to draw her warrant, under the circumstances, by the following statutes:

Acts of 1852, Chapter 7, Section 2 as the same appears in Volume 10, Pt. 1 (1964 Replacement) Burns Indiana Statutes, Sec. 49-1702 (Item Fifth); Acts of 1859, Chapter 138, Sections 7 and 8 as amended and found in Volume 10, Part 1 (1964 Replacement) Burns Indiana Statutes, Section 49-1809 and Section 49-1810; Acts of 1905, Chapter 169, Section 520 as found in

Volume 4 (1956 Replacement) Burns Indiana Statutes, Section 10-3715, Appendix C pp. 72 and 73.

The discriminatory tax adjustment made by the lower court flows from that Court's insistence that its judgment in favor of Respondent, a public corporation, establishing public rights against its creator to tax funds from the State General Fund must not be impaired by the legislature. The statutory or legislative authority required by Art. 10, § 3 of the Indiana Constitution, to draw a warrant, cannot be supplied by a trial Court's mandate. *United States v. County of Clark*, 95 U.S. 769, 773 (1877), where the Court said:

> "A mandamus does not confer power upon those to whom it is directed. It only enforces the exercise of power already existing, when its exercise is a duty." See also, Indiana's Mandate Statute, Burns Annotated Statutes, Vol. 2, pt. 3, § 3-2205, Appendix C, p. 72.

Another factor contributing to the prejudicial nature of the Court's decree was the refusal of that court to recognize that with the repeal of House Enrolled Act 1818, this action changed from a mandate action requiring the Petitioners to perform their duties under House Enrolled Act 1818, to a collection proceedings against the State of Indiana, without the state's consent. The trial Court's mandate had thus become an execution against the state.

Consent to be made a party can be given by the state only by a legislative enactment clearly evincing such consent. *State ex rel. Ind. Dept. of Conservation v. Pulaski Cir. Ct.*, 231 Ind. 245, 251, 108 N.E. (2d) 185, 187 (1952).

A study of Indiana Sovereignty law is set out in *Ford Motor Co. v. Department of Treas. of State of Indiana*, 323 U.S. 459 (1943), at pages 467 to 469, both inclusive.

Article 4, § 24 of the Constitution provides:

> "Provision may be made, by general law, for bringing suit against the State, as to all liabilities originating after the adoption of this Constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed."
>
> We interpret this provision as indicating a policy prohibiting state consent to suit in one particular case in the absence of a general consent to suit in all similar causes of action. Since the state legislature may waive state immunity only by general law, it is not to be presumed in the absence of clear language to the contrary, that they conferred on administrative or executive officers discretionary power to grant or withhold in individual cases. Nor do we think that any of the general or special powers conferred by statute on the Indiana attorney general to appear and defend actions brought against the state or its officials can be deemed to confer on that officer power to consent to suit against the state in courts when the state has not consented to be sued.

This is applicable today except in the area of proprietary activities of the State. Since this action involves only governmental activities and the Ford case has been cited with approval by the Indiana Supreme Court in *State v. Young*, 238 Ind. 452, 151 N.E. 2nd 697, 700 (1958), the above quotation is submitted.

It appears that when the officers as nominal parties have no personal liability and the action is in essence one for the recovery of money from the state treasury, the state is the real party in interest, even though the officers are the nominal defendants and the state's immunity will extend to and protect the officers.

2. The decision of the court below is inconsistent in principle with the requirements of due process established in this court in *Griffin v. Griffin*, 327 U.S. 220 (1946).

Notice and an opportunity to be heard are basic requirements of our judicial system which should have been but were not extended to Trudy Slaby Etherton, as Auditor, in office thirty-one (31) days prior to the entry of Judgment.

Two state statutes pertaining to substitution of parties were applicable to Petitioner, Trudy Slaby Etherton, when she became Auditor on December 1, 1968. (Acts of 1881 (Spec. Sess.), ch. 38, § 23 and § 848; Burns Annotated Statutes, 1967 Repl. 2-227 and 2-228; Appendix C, pp. 73 to 74.)

The action was commenced in 1967 against John P. Gallagher as Auditor. His term of office terminated on December 1, 1968 so that under Burns Ind. Stat., § 2-227, *supra*, he became a party defendant with a disability.

The action did not abate, and on motion or by filing supplemental complaint Respondent could have properly substituted the new Auditor, Trudy Slaby Etherton, by following the statutory procedure in the two statutes set out above and proceeded to judgment with proper parties defendant. (Burns Ind. Stat., § 2-227; Appendix C, p. 73.) Respondent failed to do this. Respondent did not, as was its duty, bring in the new Auditor, so that Trudy Slaby Etherton's right as Auditor to notice and to be heard before judgment set out in Burns Ind. Stat., § 2-228 could be saved. *Milich v. Schlesinger*, 156 Fed. S. 658 (1957).

Judgment was entered against John P. Gallagher as Auditor thirty-one (31) days after he had vacated office and thirty-one (31) days after Trudy Slaby Etherton had entered her term of office. Aid to Judicial Notice filed December 10, 1969; Appendix D, p. 76.

The judgment entered without the incumbent Auditor before the Court is lacking in due process under the Four-

teenth Amendment and is an invalid judgment as to the petitioner, Trudy Slaby Etherton, as Auditor. *Simon v. Craft*, 182 U.S. 427, 436 (1901).

Approximately eleven (11) months after judgment, that is, on October 21, 1969, Petitioner, Trudy Slaby Etherton, was served with an order from the trial court issued *sua sponte* purporting to bring her before the court for the first time. She was considered necessary for the collection proceedings but not for the decision on the merits.

On November 6, 1969 the order of October 21, 1969 was rescinded and ordered expunged from the records of this cause and a new order of mandate was issued. Again, on the trial Court's own motion, Petitioner, Trudy Slaby Etherton, was joined as a party defendant in her official capacity. On November 19, 1969, Petitioner, Trudy Slaby Etherton, filed a response to the November 6, 1969 order setting up the above facts as to service of summons and the lack of opportunity to be heard before judgment and pointing out that the procedure was inconsistent with the due process clause of the Fourteenth Amendment.

On the same day, November 19, 1969, the Chief Justice of the trial court ordered said response stricken from the record for the reason same is a sham, surplusage, tautology and irrelevant to the matter at issue. And a Docket Entry showing the filing of said response was obliterated from the Court Docket sheet.

In subsequent pleadings, Petitioners have objected to the lower court's *sua sponte* substitution of these petitioners during the collection proceedings after judgment, and the Court in its opinion of December 16, 1969, takes the position that the question is waived by the appearance of the parties. An examination of the pleadings and docket sheet will show that of these Petitioners only John K. Snyder was

served with notice in this action in the trial court. All of the other Petitioners were joined by the court's *sua sponte* substitution on October 31, 1969. The responsibility for substitution was the Respondents. *Milich v. Schlesinger*, 156 Fed.S. 658 (1957). For the court to substitute on its own motion was in excess of the court's power. *Montgomery v. Polk Milk Co.*, 118 Ind. App. 433, 440, 79 N.E. 2d 408 (1948).

The opinion of December 16, 1969 does not deal with or dispose of the failure to substitute Trudy Slaby Etherton, as Auditor, prior to judgment although this is the due process question.

Neither the Court nor Respondent has shown authority for the proposition that it was unnecessary to substitute Etherton for Gallagher, prior to judgment. Everything cited by the court and that found by these petitioners, including the statutes on substitution, makes it the duty of the Plaintiff to substitute a successor Defendant prior to judgment.

If this were not true, the requirements of due process announced by this court in *Griffin v. Griffin*, *supra*, and *Simon v. Craft*, *supra*, would require such substitution.

3. The cases appear uniformly to hold that a trial by a biased court is not in conformity with due process. *Inland Steel Co. v. National Labor Relations Board*, 109 F. 2d 9, 21 (1940); *National Labor Relations Board v. Ford Motor Co.*, 114 F.2d. 905, 909 (1940).

Items A (2), (3) and (5) of question number 3 are amply developed in the discussion under question number 2, this Petition, pp. 20 to 23.

Item A (1), although on its face innocuous, is the source of much of the difficulty in this case. By the Court's delay in

filing the decision till the last day of December, 1968, when the personnel of both Courts would change on the next day and one of the attorneys for Respondent in this case would become a Judge on the Supreme Court, who would of necessity abstain from all proceedings, the vote, two in favor, two against and one abstaining on all efforts to obtain review before the Supreme Court, resulted. The footnote on page 648 of the official report of this case, 242 N.E. 2d 642, shows that the vote on this opinion was taken, at the very latest, on the 21st day of November, 1968, the date of Judge Cook's death. See 140 Indiana Appellate, p. XXX, VII, In Memoriam. Appendix D, p. 77.

Item A (6) in question 3 involves the Court's determination to enforce its mandate as a money judgment for Respondents and furnish an enforceable Order even to the extent of making changes *sua sponte* and inconsistent with Respondents' prayer.

This was an action in mandate. The primary relief sought was an order directing the Petitioners to perform their duties under House Enrolled Act 1818. On December 31, 1968, the trial Court entered a finding that House Enrolled Act 1818 had been the law since January, 1967, reversed the pocket veto law, and held that Respondent should have judgment but did not issue its mandate.

That the trial Court's mandate is its judgment in a mandate case is recognized by the Indiana Supreme Court in *Shrader, Road Supervisor v. State ex rel. Mason*, 157 Ind. 341, 61 N.E. 721 (1901), where the Court said "the Court on June 12, 1900 rendering its final judgment, whereby preemptory writ of mandate was directed to issue against Shrader."

Within the period from October 21 to December 16, 1969 the Appellate (trial) Court issued four distinct mandate

orders, which were to operate as orders of execution to satisfy a money judgment against the State for the benefit of the M.T.A. (the City of Indianapolis, not a party of record, received the money) and the Respondent attorneys.

CONCLUSION

For the above reasons Petitioners respectfully suggest that a writ of certiorari should issue to review the judgment and opinion of the Appellate Court of Indiana.

Respectfully submitted,

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EME COURT, U. S.

FILED
JUL 10 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM 1970

NO. [redacted] 248

INDIANA REVENUE BOARD, ET AL.,

Petitioners,

v.

STATE OF INDIANA, on the relation of the City of Indianapolis, as successor in interest to the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, and Richard M. Givan and John F. Neff,

Respondents.

RESPONDENTS APPENDICES TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA

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IN THE

Supreme Court of The United States

OCTOBER TERM 1970

NO. 1680

INDIANA REVENUE BOARD, ET AL.,

Petitioners,

v.

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APPENDIX A

Petitioners on page 1 of their Appendices, in Appendix A state as follows:

"No. 767 A39
Appellate Court of Indiana
In Banc
Dec. 16, 1969
Transfer Denied Dec. 17, 1969"

This should be:

"No. 767 A 39
Appellate Court of Indiana
In Banc
Dec. 16, 1969
Transfer Denied Feb. 3, 1970"

APPENDIX B

REMOVAL STATUTE

Burns § 3-2121. Restraining or mandating actions of public officials—Original jurisdiction of Appellate Court.—Original jurisdiction to restrain or enjoin any public official from doing any act authorized by any act of the general assembly and to mandate any public official to do any act prohibited by any act of the general assembly is hereby conferred on the Appellate Court of Indiana. Said jurisdiction shall be invoked by the Attorney-general's removal, pursuant to this act (§§ 3-2121–3-2131), of an action from the court in which it is filed, and thereafter the Appellate Court of Indiana shall have jurisdiction of all further proceedings in any case so removed. This grant of jurisdiction shall carry with it complete jurisdiction to hear and determine the entire action in which such relief is demanded, but if it appears to the Appellate Court of Indiana that there is no equity in the demand for injunctive or mandatory relief against any public official, the suit shall be dismissed without prejudice as to the other relief demanded, or it may be remanded to the court from which it was removed, without making any adjudication not necessary to the denial of injunctive or mandatory relief. (Acts 1965 (2nd Spec. Sess.), ch. 7, § 2, p. 28.)

Burns 3-2122. Removal of cases to Appellate Court—Duties of attorney-general.—If in any case pending on the

date this act (§§ 3-2121—3-2131) shall become effective (October 29, 1965) or in any case filed thereafter in any court of this state except the Supreme or Appellate Courts, a demand is made for the restraint or injunction of a public official from doing any act authorized by any act of the general assembly, whether valid or invalid, constitutional or unconstitutional, or demanding the mandate of any public official to perform any act prohibited by any act of the general assembly, whether valid or invalid, constitutional or unconstitutional, the attorney-general shall remove such case to the Appellate Court of Indiana whenever he deems it necessary or desirable for the purposes of the uniform and orderly enforcement and effectiveness of acts of the general assembly of state-wide public interest and concern that the case be determined by a court with state-wide jurisdiction.

After removal of the case to the Appellate Court of Indiana, the court from which the case is removed, and the judge thereof, shall have no further jurisdiction in the proceedings, unless the case is remanded or transferred to that court by the Appellate Court of Indiana pursuant to this act. (Acts 1965 (2nd Spec. Sess.), ch. 7, § 3, p. 28.)

Burns § 3-2123 Time and method of removal to Appellate Court.—No cases shall be removed pursuant to this act (§§ 3-2121—3-2131) before this act shall have been effective for a period of fifteen (15) days, except as otherwise provided in this act. The removal of cases pending on the effective date of this act, (October 29, 1965) or within fifteen (15) days thereafter shall be effected by the attorney-general within forty-five (45) days after the effective date of this act. Thereafter, the attorney-general shall have thirty (30) days after service of notice or a

copy of the pleading demanding such relief upon him in which to remove a cause to the Appellate Court of Indiana pursuant to this act. Such removal shall be effected when the attorney-general files with the clerk of the Appellate Court of Indiana, a verified petition for removal, together with copies of all pleadings, motions, demurrers, orders, injunctions, mandates and order-book entries in the cause, and serves notice thereof by first class mail on all parties to such action or on their attorneys of record. Such filing shall constitute a removal of said cause to the Appellate Court of Indiana which shall thereafter have jurisdiction of all further proceedings. (Acts 1965 (2nd Spec. Sess.), Ch. 7, § 4, p. 28.)

Burns § 3-2124. Petition for remand.—In any case which has been removed to the Appellate Court of Indiana pursuant to this act (§§ 3-2121—3-2131), any party may file a verified petition supported by a brief and serve notice on all other parties, or on their attorneys, requesting the court to remand the case to the court in which it was filed on the ground that the removal is contrary to law in that the attorney-general's determination that it is necessary or desirable for the purposes of the uniform and orderly enforcement and effectiveness of valid acts of the general assembly of state-wide interest and concern that the cause be determined by a court with statewide jurisdiction is arbitrary, capricious or illegal. Such petition shall be filed within thirty (30) days after the removal is effected. Petitioner shall be entitled to a hearing before a commissioner appointed by the Appellate Court of Indiana pursuant to this act. Said petition shall be granted or denied at the discretion of the Appellate Court of Indiana en banc.

The filing of a petition pursuant to the provisions of this section shall not delay or postpone any other hear-

ings, arguments, determinations or expirations provided for under other sections of this act. (Acts 1965 (2nd Spec. Sess.) ch. 7, § 5, p. 28.)

Burns § 3-2125. Rules of Appellate Court.—The Appellate Court of Indiana shall adopt and promulgate rules for the exercise of the jurisdiction conferred on it by section 2 (§ 3-2121), hereof. Such rules may, at the discretion of the Appellate Court of Indiana, provide for orders of reference to any judge of a court of inferior jurisdiction to facilitate the taking of evidence and conduct of hearings, including hearings and the taking of evidence incidental to the enforcement of any restraining order, temporary injunction, permanent injunction, or writ of mandamus issued by the Appellate Court of Indiana or its judges. More than one reference may be made simultaneously or successively as the exigencies of the case and the convenience of witnesses and parties may require.

Such rules shall provide for the manner of continuance or expiration of orders issued by the court in which the cause was filed consistent with the provisions of this act (§§ 3-2121—3-2131). (Acts 1965 (2nd Spec. Sess.), ch. 7 § 6, p. 28.)

Burns § 3-2126. Oral argument—Dissolution or continuance of restraint or mandate—Hearing on permanent injunction or mandate.—At the time of removal of a case by the attorney-general, the chief justice of the Appellate Court of Indiana, or in his absence, the presiding justice, shall fix a date and hour not less than three (3) days nor more than seven (7) days after the date of removal, on which oral arguments will be heard and additional affidavits received on the question of whether any restraining order or preliminary mandate issued by the court in which the case was filed shall be continued in effect until the question of granting a temporary injunction or writ of

mandate is heard and determined. The court en banc shall hear such arguments and review whatever additional affidavits may be offered by any party, and unless at least five (5) judges who hear such oral arguments sign an order on the day of such argument continuing the restraint or mandate in effect as originally issued or as modified by a new order, all restraint or mandate shall thereupon stand dissolved by operation of law. The presence of less than five (5) judges at the time stated in the order for the argument shall also have the effect of dissolving the restraining order or writ of mandate.

Every continuance of a restraining order or preliminary mandate after oral argument shall contain a statement of the date, time and place of hearing on the question of granting a temporary injunction and the name of a judge of an inferior court who will conduct such hearing as commissioner of the Appellate Court of Indiana, whose duty it shall be to report the evidence verbatim to the Appellate Court of Indiana with his recommended findings of fact and conclusions of law within fifteen (15) days of the date set in the order for the hearing.

Any temporary injunction or mandate issued prior to removal shall expire or survive after removal upon the same contingencies and by the same procedures provided for the survival or expiration of restraining orders or preliminary writs of mandate issued prior to removal. Any party may submit to the Appellate Court of Indiana at the oral argument a complete transcript of the evidence on the basis of which the judge or court issued the order or injunction or preliminary mandate being reviewed. Every continuance of a temporary injunction or mandate after oral argument shall contain a statement of the date, time and place of hearing on the question of granting a

permanent injunction or writ of mandate, and the name of a judge of an inferior court who will conduct such hearing as commissioner of the Appellate Court of Indiana, whose duty it shall be to report the evidence verbatim to the Appellate Court of Indiana with his recommended findings of fact and conclusions of law within fifteen (15) days of the date set in the order for the hearing.

Temporary injunctions, permanent injunctions and writs of mandate may be granted or denied by the Appellate Court of Indiana only when sitting en banc. (Acts 1965 (2nd Spec. Sess.), ch. 7, § 7, p. 28.)

Burns § 3-2127. Transfer to Supreme Court limited.—No petition to transfer to the Supreme Court may be filed in an action removed to the Appellate Court of Indiana pursuant to this act. (§§ 3-2121—3-2131) prior to a grant or denial of a permanent injunction or writ of mandate or other final adjudication. A final adjudication may be reviewed by the Supreme Court in the same manner and following the same procedures required for transfer in other civil cases. (Acts 1965 (2nd Spec. Sess.), ch. 7, § 9, p. 28.)

Burns § 3-2128. Writs and orders—Authority of Appellate Court to issue.—The Appellate Court of Indiana is hereby authorized to issue all writs and orders necessary to effectuate its jurisdiction under this act (§§ 3-2121—3-2131). (Acts 1965 (2nd Spec. Sess.), ch. 7, § 10, p. 28.)

TERMINATION OF M.T.A. STATUTE

Burns § 48-9213. Existing boards, agencies and commissions.—At the time all or substantially all of the power and duties of any agency, board or commission of a first class city are transferred under the terms of this act

(chs. 91-95 of this title) to any departments, special taxing districts or special service districts of the consolidated city, such agency, board or commission of the first class city shall be abolished.

At the time the power and duties to perform any function is transferred from any agency, board or commission of the first class city, the county or any body corporate to the consolidated city, or any department, special taxing district or special service district thereof, the property, records, personnel, contracts and all other rights and liabilities thereof related to such function, including all rights and obligations arising under any pension or retirement plan or fund shall be similarly transferred except as follows: (1) the city-county council may by ordinance direct a different repository therefor; (2) general obligation bonds or other indebtedness of the first class city or indebtedness assumed by the first class city, other than bonds or indebtedness relating to the function of a special service district, shall be binding upon and obligations of the consolidated city; (3) bonds or indebtedness relating to any function transferred to a special service district shall be binding upon and obligations of the consolidated city; (4) bonds and indebtedness of any special taxing district shall be the obligation of the special taxing district which continues the function of the special taxing district on account of which such bonds and indebtedness were issued. Nothing in this act shall be construed to impair the obligation of any indebtedness or contract existing on the effective date (January 1, 1970) of this act.

All proceedings and petitions pending before any board, commission or other agency at the effective date the powers thereof are transferred under the terms of this act shall be transferred to the official, board, commission

or agency who would have the power to act upon such proceeding or petition under the terms of this act.

All other municipal corporations, boards, agencies and commissions created by applicable law, or by any ordinance until such ordinance is amended, shall not be affected by this act, except to the extent that such powers are transferred to the consolidated city or department thereof or are otherwise limited under this act. Without limiting the generality of the following enumeration, such municipal corporations, boards, agencies, authorities and commissions shall include: airport authority and board established pursuant to Acts 1961, c. 283 (§§ 14-1301—14-1336); health and hospital corporation and board established pursuant to Acts 1951 c. 287 (§§ 35-902—35-950); county department of welfare and board established pursuant to Acts 1936 (Spec. Sess.), c. 3. (§§ 52-1001, 52-1101—52-1130, 52-1201, 52-1278, 52-1301—52-1315, 52-1401—52-1417); county home board established pursuant to Acts 1965, c. 119 (§§ 22-2801—22-2819); building authority, board of trustees and board of directors established pursuant to Acts 1953, c. 54 (§§ 26-2501—26-2523); capital improvements board of managers established pursuant to Acts 1965, c. 326 (§§ 26-2801—26-2824); housing authority established pursuant to Acts 1937, c. 207 (§§ 48-8101—48-8127), except to the extent expressly limited or changed by Article VIII (§§ 48-9326—48-9339) of this act; library districts and boards thereof established pursuant to Acts 1947, c. 321 (§§ 41-901—41-921); and any school corporation, all or a part of the territory of which is in the consolidated city or county. Where, however, after the effective date of this act, the power to make an appointment to the governing body or any other board connected with such board, agency or commission, or the power to take any action in connection with the operation of such

board, agency or commission, is vested in the county council of the county or the common council of the first class city, such power shall be vested in the city-county council. (Acts 1969, ch. 173, § 314, p. 357.)

SUPREME COURT EQUALLY DIVIDED RULE AND STATUTE

Indiana Rules of Civil Procedure

Appellate Rule 15

Opinions, Powers, and Conduct of Court on Appeal; Miscellaneous Provisions

* * *

(E) Supreme Court equally divided. Whenever, on the hearing of an appeal, one of the judges of the Supreme Court has been of counsel in the cause, or is otherwise disqualified to participate in the decision, and the remaining judges are equally divided, the judgment shall be affirmed without cost. In such case, each judge shall give his written opinion of each point in the case arising upon the record, which shall be reported among the cases decided by the Supreme Court.

Burns' § 2-3272 (726) One judge interested, others equally divided—Procedure.—Whenever, on the hearing of an appeal, one of the judges of the Supreme Court has been of counsel in the cause, or is otherwise incompetent to participate in the decision, and the remaining judges are

equally divided, the cause shall be continued to the next term; and if, then, the judges shall be equally divided, the judgment shall be affirmed without costs, and in such case, each judge shall give his written opinion of each point in the case arising upon the record, which shall be reported among the cases decided by the Supreme Court. (Acts 1881 (Spec. Sess.) ch. 38, § 54, p. 240.)

WAIVER BY APPEARANCE STATUTE

Burns' § 2-803. Service of summons—Waiver or appearance—Guardian ad litem for insane.—The summons shall be served, either personally on the defendant, or by leaving a copy thereof at his usual or last place of residence. An acknowledgment on the back of the process, or the voluntary appearance of a defendant, is equivalent to service. Process against persons of unsound mind shall be served upon the guardian of such persons, if there be a guardian. If no guardian shall have been appointed, then such process shall be served, by copy, upon the superintendent of the hospital in which such person shall be confined, or upon the person having charge or custody of such person; in which case, upon proof of the insanity of the defendant, the court shall appoint a guardian ad litem for such defendant, whose duty it shall be to make proper defense to such action. (Acts 1881 (Spec. Sess.) ch. 38, § 56, p. 240.)

APPENDIX C

STATE OF INDIANA, on the relation of the MASS TRANSPORTATION AUTHORITY OF GREATER INDIANAPOLIS, A Municipal Corporation, Plaintiff,

v.

INDIANA REVENUE BOARD, Roger D. Branigin, as a Member of the Indiana Revenue Board JOHN K. SNYDER, Treasurer of the State of Indiana, and as a Member of the Indiana Revenue Board, JOHN P. GALLAGHER, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board, INDIANA DEPARTMENT OF STATE REVENUE, WILLIAM L. FORTUNE, as Commissioner of the Indiana Department of State Revenue, THE STATE BOARD OF TAX COMMISSIONERS, LARRY R. MOHR, HERBERT C. HOLMES, as Members of the State Board of Tax Commissioners of Indiana, T. MICHAEL SMITH, as Inheritance Tax Administrator, Defendants.

No. 767A39

Supreme Court of Indiana
January 22, 1969

ORDER

Pursuant to the defendants' Petition for Instruction filed herewith, and upon the case of *State ex rel. Socialist Labor Party v. State Election Board* (1968) —— Ind. ——, 241, N.E. 2d 69, it is

ORDERED that a Petition for Rehearing before t
Appellate Court is not necessary for the filing of an app
cation to transfer this case to this court.

Dated this 22 day of January, 1969.

/s/ ROGER O. DeBRULER

Roger O. DeBruler
Chief Justice

LIBRARY
PREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 10 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

NO. [redacted] 24

INDIANA REVENUE BOARD, ET AL.,

Petitioners,

v.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA

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Burns Indiana Statutes (1969 Supp.) Section 48-9213	3
House Enrolled Act 1818 of the 1967 Indiana General Assembly (Never published)	4, 6, 11, 14
Acts of 1969, Chap. 20, (House Enrolled Act 1135)	6

MISCELLANEOUS

Indiana Rules of Civil Procedure, Appellate Rule 15E	4

IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

NO. 1680

INDIANA REVENUE BOARD,

EDGAR D. WHITCOMB, as Governor of the State of Indiana and as a Member of the Indiana Revenue Board,

JOHN K. SNYDER, Treasurer of the State of Indiana, and as a Member of the Indiana Revenue Board,

TRUDY SLABY ETHERTON, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board,

INDIANA DEPARTMENT OF STATE REVENUE,

JAMES O. MATHIS, as Commissioner of the Indiana Department of State Revenue,

THE STATE BOARD OF TAX COMMISSIONERS,

JOSEPH D. GIESLIN, JR., CARLETON L. PHILLIPPI, and DURWOOD STRANG, as Members of the State Board of Tax Commissioners of Indiana,

RICHARD D. GREEN, as Inheritance Tax Administrator,

Petitioners,

v.

STATE OF INDIANA, on the relation of the City of Indianapolis, as successor in interest to the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, and RICHARD M. GIVAN and JOHN F. NEFF,

Respondents.

OPINIONS BELOW

The Petition for Certiorari is directed to an order of the Indiana Supreme Court entered on February 3, 1970, refusing to accept transfer of an order of the Appellate Court of Indiana, entered on December 16, 1969. The Respondent, State of Indiana on the Relation of the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, filed a Verified Petition for Order for Payment of Funds Pursuant to Judgment setting out that the Petitioners had been mandated to act in accordance with a judgment of the Appellate Court of Indiana entered on December 31, 1968, and affirmed by the Indiana Supreme Court on February 6, 1969, but that Petitioners had failed to comply with the Court's mandate. A petition for Rehearing filed by the Petitioners was denied by the Indiana Supreme Court on March 13, 1970.

JURISDICTION

The Petitioner is invoking the jurisdiction of this Court under 28 U.S.C. Sec. 1257(3). As set forth in Rule 19 of the Supreme Court of the United States, "A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore."

The decision of the Appellate Court of Indiana was based upon non-Federal ground which was adequate to support th Court's judgment.

The Petitioners have waived any claim under the Equal Protection Clause of the Fourteenth Amendment, since it was not seasonably raised.

QUESTIONS PRESENTED

1. Whether the Order and Opinion of the Indiana Ap-

pellate Court dated December 16, 1969, was appealable and is subject to a writ of certiorari?

2. Whether any of the Federal questions presented by the Petitioners were preserved by them by having been seasonably raised?

3. Even if the Federal question of equal protection was raised at an early enough time to preserve it for certiorari, were the Petitioners the proper parties to raise it, and in the alternative, hasn't the question of equal protection been raised prematurely?

4. Were the Federal questions concerning due process of law substantial so as to enable this Court to issue a Writ of Certiorari, and were these Federal questions at all or were they instead properly decided State questions?

5. Whether John F. Neff and Richard M. Given are proper respondents in this action?

STATUTES AND RULES INVOLVED

In addition to the Statutes set forth by the Petitioners, the Respondents submit at Appendix B, pages A-2 to A-12, the following statutes and rules:

Statutes providing for removal of cases to the Indiana Appellate Court, Acts of 1965 (2nd Spec. Sess.) Ch. 7, Burns' Ind. Statute Vol. 2., Pt. 2 (1968 Repl.) § 3-2121-3-2128.

Statute creating the department of Transportation of the Consolidated City of Greater Indianapolis, successor to the Mass Transportation Authority. Acts of 1969, ch. 173, § 314, Burns' Indiana Statute Ann. (1969 Supp.). § 48-9213.

Statute regarding a two-two division on the Indiana Supreme Court, in effect until January 1, 1970, then Re-

placed by an identical rule. Acts of 1881 (Spec. Sess.), Ch. 38, § 654, Burns' Indiana Statute Ann. (1968 Repl.) § 2-3232.

Appellate Rule 15 (e) of the Indiana Rules of Civil Procedure.

Statute regarding waiver of service of process for successor party.

Act of 1881 (Spec. Sess.) Ch. 38, § 56, Burns' Indiana Statute Ann. (1967 Repl.), Sec. 2-803.

STATEMENT OF THE CASE

I.

Proceedings Prior to and Including Judgment

On the last day of the 1967 session of the Indiana General Assembly, House Enrolled Act No. 1818, which alters the formula for distribution of inheritance taxes collected by each county, having been duly passed by both houses, was presented to and accepted by the Governor for final action by him. The Governor did not veto the bill by any of the methods prescribed by the Indiana Constitution. He in fact took no action on the bill, attempting to exercise what was known as a "pocket veto." The bill contained an emergency clause which caused it to become effective immediately upon passage. In Indiana a bill presented to the Governor becomes law after five days, if he fails to sign it or veto it.

Later, when the Auditor and the Treasurer of Indiana failed to pay to the Mass Transportation Authority of Greater Indianapolis (the recipient of Marion County's new share of inheritance taxes under House Enrolled Act 1818), the Mass Transportation Authority employed Richard M. Givan and John F. Neff to file an action to

mandate the various state officials to comply with the ministerial acts dictated by House Enrolled Act No. 1818. The action was filed in July, 1967. The Indiana Attorney General, pursuant to Acts of 1965 (2nd Spec. Sess.), Ch. 7, Burns' Indiana Statute Ann. (1968 Repl.) § 3-2121 thru 3-2129, requested the Indiana Appellate Court to remove the suit to that Court for original action there. The Appellate Court agreed to remove the case and accept jurisdiction and thus became the trial court.

The matter was put at issue by cross motions for judgment on the pleadings and cross motions for summary judgment.

On December 31, 1968, the written opinion of the majority of the Appellate Court was certified to the Clerk of the Court holding so-called pocket vetoes invalid and rendering a judgment for the Mass Transportation Authority in its request for a mandate.

II.
Post Judgment Proceedings

On January 10, 1969, the Petitioners filed a Petition to Transfer to the Indiana Supreme Court and also a Petition for Rehearing with the Appellate Court. In neither of these petitions were any Federal questions raised. They then requested instruction from the Indiana Supreme Court as to the proper method of appealing under the "Removal" Statute, since the Appellate Court had acted as trial court. The Indiana Supreme court advised them that, as had been previously held, a Petition for Rehearing was unnecessary as a prerequisite for filing a Petition to Transfer and that this latter petition was proper. On February 6, 1969, the Judgment of the Ap-

pellate Court was affirmed when the Indiana Supreme Court split-two members voting to refuse transfer, two voting to accept transfer and one member abstaining. The abstaining member was Richard M. Givan, one of the original attorneys of record, newly elected to the State's highest court.

On the very same day, February 6, 1969, the House of Representatives of the Indiana General Assembly, which was then in session, voted to suspend rules and passed House Enrolled Act 1455, now Acts of 1969, Chapter 20, a retroactive repealer of House Enrolled Act No. 1818. The bill was passed by the Senate on the following day, and signed by the Governor on February 12, 1969. That act, too, contained an emergency clause. On February 28, 1969, the Respondent filed its Petition for Order for Payment of Funds Pursuant to Judgment, and John F. Neff filed a Notice of Attorney's Lien which was, in accordance with the terms of the written contract which he and Richard M. Givan had entered into with the Mass Transportation Authority.

Defendants filed their Motion to Dismiss Respondent's Verified Petition for Order for Payment of Funds on April 11, 1969, and Respondents filed Answer to said Motion to Dismiss on April 24, 1969.

On October 21, 1969, the Court overruled the Motion to Dismiss, granted Plaintiff's Verified Petition for Order for Payment of Funds and ordered the Treasurer of the State to certify the amounts due Respondent to the Auditor of the State of Indiana and ordered the Auditor to draw her warrant. In this Order, the Court on its own Motion substituted all of the Petitioners except John K. Snyder, Treasurer, as parties, in lieu of their predecessors in office. The Auditor of the State, Trudy Slaby Eth-

erton, had been in office since December 1, 1968, the other taking office on or after January 1, 1969.

An amended Order was issued on November 6, 1969, rescinding the order of October 21, 1969. The Amended Order corrected wording which confused the method of computing the amount due the Mass Transportation Authority. This order was pursuant to Respondent's petition.

The Petitioners again filed a Petition to Transfer the order of November 6, 1969, to the Indiana Supreme Court, said transfer being denied when Judge Givan abstained and two voted for transfer and two against transfer.

Although the Petitioners, pursuant to their own request eight (8) months earlier had been instructed that the proper method of proceeding was by Petition to Transfer, they, nevertheless, on November 15, 1969, filed a Motion for New Trial relating back to the Judgment rendered on December 31, 1968. It was in this motion that the Petitioners first raised a question of substitution of the Parties. The Appellate Court dismissed this Motion and had it expunged from the record, since it not only was too late but was completely improper procedurally.

The State Treasurer and Auditor responded to the court's order that they were unable to compute the amount of Inheritance Taxes paid to the State by Marion County for the calendar years 1967 and 1968. The court then issued its order of November 19, 1969, ordering each defendant to make the computation or show by affidavit that they could not. The Inheritance Tax Administrator, Richard Green, and Joseph Geeslin and Durwood Strang, Members of the State Board of Tax Commissioners, defendants in this case, did make computations and submitted identical amounts. The Appellate Court then issued a new order on December 16, 1969, requiring the

Auditor to issue her warrant on or before December 22, 1969, and ordering the Treasurer to honor said warrant. The Appellate Court also issued a lengthy written opinion found in Petitioner's Appendices, Appendix A.

The Auditor refused to comply with the Appellate Court Order and on December 23, 1969, the Respondent initiated contempt of court proceedings against her.

On February 26, 1970, the Auditor was found in contempt of court and committed to the Marion County Jail where she remained for five (5) minutes. Finally on March 4, 1970, the Auditor issued her unconditional warrant to the Clerk of the Supreme and Appellate Court in the amount ordered, $12,737,338.97, and thus purged herself of contempt. This amount was disbursed in accordance with the order of the Appellate Court dated December 16, 1969. (Petitioner's Appendix A)

Meanwhile, on January 5, 1970, the Petitioners had again filed a Petition To Transfer from the Appellate Court's Order of December 16, 1969. This Petition was denied on February 3, 1970, and Petitioners' Petition for Rehearing filed February 24, 1970, was likewise denied on March 13, 1970. In both cases the vote was the same, two to two, Judge Givan abstaining.

On January 1, 1970, a statute known as "The Consolidated First Class Cities and Counties Act" went into effect. Under the terms of that act the Department of Transportation of the Consolidated City of Greater Indianapolis became the successor in interest to the M.T.A. and, therefore, became the Plaintiff in this action, and the M.T.A. ceased to exist.

The Petition for Writ of Certiorari by the Petitioners then is taken solely upon the Appellate Court's order and Opinion dated December 16, 1969.

ARGUMENT

I.

REASONS FOR DENYING THE WRIT

The Case Presents No Novel or Far-Reaching Questions

There is nothing unique or unusual about the law in this case. The opinions of the Courts below cite much authority for the position which they took on each point in question.

The main thing that is unusual is the fact that the Petitioners filed five separate petitions to transfer (only two of which were from appealable orders), a motion for new trial from the Appellate Court (after having been advised upon their Petition for Instructions by the Indiana Supreme Court to proceed differently), and a Petition for a Writ of Certiorari setting out questions which had never been previously raised in State Court and including two Respondents who, though available, had never been made parties at the State Court level.

The chief question which runs through the entire fabric of the post judgment activity is a non-federal one. That is, whether either by administrative refusal or by legislative act a valid, binding, final judgment of a court, say the highest court in a state, can be ignored or invalidated successfully.

The case law of the State of Indiana says that this cannot be done. *Columbus, C & I C.R.W. Co. v. Board of Com'rs. of Grant County, et al.* (1879), 65 Ind. 427, 438:

Searcy v. The Patriot and Barkworks Turnpike Co., et al., (1881) 79 Ind. 274, 279; *Citizens State Bank of Carmel v. Perisko* (1921), 77 Ind. App. 70, 130 N.E. 857.

In the case of *Thorpe v. King* (1967) 248 Ind. 283, 227 N.E. 2nd. 169, this was held to apply not only to legislative attempts to extinguish judgments which created private rights but also public ones.

The Indiana Supreme Court's reasoning was based upon the fact that neither the Executive nor the Legislative Branch of government can so encroach upon the Judicial branch and remain within the bounds of Article 3, § 1 of the Constitution of the State of Indiana establishing separation of powers.

That is the law in the State of Indiana and in numerous other of the fifty states.

Also running through the fabric of this case is whether forgotten or omitted defenses can be raised by filing new appeals from orders which are not appealable, and when they are denied, invoke the jurisdiction of the United States Supreme Court.

The Petitioners would have this court attempt to establish as a uniform rule for all fifty states that a state court judgment establishing a public right may be extinguished by a retroactive repealer. This is purely a state question, and historically the United States Supreme Court will not impose its will in such matters. *Henry v. State of Mississippi, Miss.* (1965), 379 U.S. 443, 85 S. Ct. 564, 13 L.Ed. 2d 408, Rehearing Denied, 380 U.S. 926, 85 S. Ct. 878, 13 L. Ed. 2d 813, Remand Denied, 381 U.S. 908, 85 S. Ct. 1528, 14 L. Ed. 2nd 431.

The Indiana Appellate and Supreme Courts were dealing with the highest officers in the Executive Branch of the

State's government. In reading the thorough opinions it is obvious that these Courts considered this case with great care and restraint, and certainly with an eye toward avoiding anything but strict construction of their own powers under both the Indiana and the U.S. Constitutions.

In any case this is a state and not a Federal question.

II.

The Order of The Indiana Appellate Court Dated December 16, 1969, Is Not an Appealable Order.

The Order of December 16, 1969, from which this appeal is taken is in no way a final judgment. It is of a supplementary nature, ordering the Petitioners to comply with the final judgment entered on December 31, 1968. What the Appellate Court was saying by its order was this—"Despite the Legislature's attempt to repeal House Enrolled Act No. 1818 retroactively, they could not repeal it beyond the date of the judgment, and our judgment is still binding upon you, and you are to comply with it. We have thus far excused your non-compliance, but now are ordering you to comply with our mandate by December 22, 1969."

To be appealable as a final judgment an order or judgment must be one which finally determines the rights of the parties in the suit, or in some distinct and definite branch of it, and which leaves no further question or direction for future determination by the Court. *Blakeman v. Quinn et al.*, (1950), 121 Ind. App. 72, 95 N.E. 2d 638; *Greathouse v. McKinley* (1942), 220 Ind. 462, 44 N.E. 2d 344, 345.

This order did not fully determine the rights of the parties (they had already been determined) and it did

leave future questions and further determinations by the court, e.g. contempt proceedings if the mandated parties failed to comply by December 22, 1969.

That the Petitioners recognize this rule is indicated by their statement on page 24 of their Petition. "That the trial Court's mandate is its judgment in a mandate case is recognized by the Indiana Supreme Court in *Shrader Road Supervisor v. State ex rel Mason*, 157 Ind. 341, 61 N.E. 721 (1901). . . ."

The proper time to appeal the question of the existence of the judgment in view of the retroactive repealer would be when one of the parties was found guilty of contempt.

III.

None of the Federal Questions Presented by The Petitioners Were Properly or Seasonably Raised for The Purpose of a Writ of Certiorari.

The United States Supreme Court is without power to decide whether Constitutional rights have been violated when the Federal questions are not seasonably raised in accordance with the State law. *Edelman v. People of State of California*, Cal. 1953, 344 U.S. 357, 73 S. Ct. 293, 295, 97 L. Ed. 387.

Questions first presented to the highest state court on a petition for rehearing come too late for consideration by the United States Supreme Court on certiorari unless the State court exerts its jurisdiction in such a way that the case could have been brought here had the question been raised prior to the original disposition. *Radio Station WOW v. Johnson*, Neb. 1945, 326 U.S. 120, 65 S. Ct. 1475, 1480, 89 L. Ed. 2092.

The attempt to assign new errors in the petition for rehearing, which was overruled without an opinion passing on Federal Questions cannot avail. *Walters Pierce Oil Co. v. Texas*, Tex. 1909, 212 U.S. 112, 29 S. Ct. 227, 53 L. Ed. 431.

When these three rules are applied to this Petition for Writ of Certiorari, it is found totally lacking. Petitioners set out on page 10 of their petition that:

> "The equal protection question was first presented to the Supreme Court on February 24, 1970, in '*Petition for Rehearing*'." (Our Emphasis)

Later on the same page:

> "Lack of due process in the entire proceedings under the Fourteenth Amendment to the United States Constitution was first raised on *Petition for Rehearing*, with Brief, filed on February 24, 1970, seeking transfer of the Order and Opinion of December 16." (Our Emphasis)

These two questions then were admittedly on the face of the Petition, presented as an attempt to first assign new errors in the petition for rehearing which the cases of *Walters Pierce Oil Co. v. Texas*, Tex. 1909, 212 U.S. 112, 29 S. Ct. 227, 53 L. Ed. 431, and *Radio Station WOW v. Johnson*, Neb. 1945, 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092 say cannot be done.

Page 10 of the Petition also indicates that the due process question of notice and hearing was first raised in a Motion for New Trial which was filed on November 14, 1969, and which, because it was absolutely outside Indiana's rules of practice in this instance, was dismissed and stricken from the record, meaning it never was raised at all in accordance with state law. Under the rule set out in

Edelman v. People of State of California, Cal. 1953, 344 U.S. 357, 78 S. Ct. 293, 97 L. Ed. 387 such a question is not seasonably raised.

IV.

The Petitioners Are Not the Proper Parties to Raise the Question of Equal Protection for Residents of the Other Counties in Indiana, and the Question in Any Case is Prematurely Raised.

It should be here noted that all except three or four of the ninety-two counties have similar actions pending for mandate against these same petitioners for their share of inheritance tax money due them under House Enrolled Act No. 1818. None of these actions was commenced prior to October, 1969, however, and in none of these other cases has there been a final determination that any other county is or is not entitled to its share of inheritance tax money.

In addition all of the counties in which the Petitioners reside, as set out on Page 17 of the Petition, have entered into suits against the Petitioners by and through their Board's of County Commissioners. If the Petitioners want to avoid a denial of equal protection, let them merely pay the amount due the other counties and thus equate them with Marion County.

a) The denial of equal protection argument put forth by the Petitioners brings to mind the following analogy: A state finds that it has made an error in computing the tax rate for people in a certain income bracket so that 10,000 people now are entitled to refunds. All are notified, but only a few make the necessary applications for refund. The State Officials refuse to pay the persons who

have properly applied for refunds on the ground that those who have not applied for their refunds will be "denied equal protection of the law."

At present there is no determination as to whether the other counties in Indiana will get their inheritance tax money, so we cannot presume that a denial of equal protection will even take place. In any case the party who acted to protect its rights under the law should not be penalized because of those who may have failed to act.

b) The equal protection argument raised by the Petitioners is not an argument accruing to them, but one which should be made by the other counties.

In order to be granted Certiorai by the United States Supreme Court the Petitioner must show that the enforcement of the judgment would deprive them, not others of a right arising under the Federal Constitution or laws.

Liberty Warehouse Co. v. Burley T. S. Coop. M. Assn., Ky. 1923, 276 U.S. 71, 48 S. Ct. 291, 72 L. Ed. 473; *Smith v. Indiana*, Ind. 1903, 191 U.S. 138, 24 S. Ct. 51, 48 L. Ed. 125; *Marshall v. Dye*, Ind. 1913, 231 U.S 250, 34 S. Ct. 92, 58 L. Ed. 206.

Here if the courts determine that the other counties are not entitled to the same share of Inheritance Tax money as was received by the Mass Transportation Authority of Marion County, it is for those counties to complain about denial of equal protection and not these petitioners.

V.

The Non-Federal Grounds Upon Which This Case is Based are Adequate and the Federal Grounds Upon Which This Petition is Based are not Substantial Enough for the U. S. Supreme Court to Review Them.

a) Petitioners' argument regarding denial of due process revolves mainly around the fact that some of the petitioners were substituted as parties to this cause by the Appellate Court *sua sponte*.

The Indiana Appellate Court discussed this at length in its opinion of December 16, 1969, (see Petitioners' Appendices, page 6-10). The State of Indiana has a statute regarding substitution of parties (see Respondent's Appendices page A-11.) upon which the court based its decision that substitution was proper. In addition the Court held that by appearing generally and pleading to motions, etc., the Petitioners waived necessity for service of process and other notice.

These Petitioners were all state officials and the suit was filed against each individual in his capacity as an officer of the State. The Appellate Court held that such officers upon election enter their office *lis pendens*, and they are bound to know the suits pending against the office. They step into the shoes of the former office holder with all of the notice that he had.

The ruling by the highest court in a State that a substitution of defendants was properly made under state law and practices is conclusive and binding on the Supreme Court of the United States.

Boston v. Jackson, Mass. 1922; 260, U.S. 309, 43 S. Ct. 129, 67 L. Ed. 274.

b.) The Petitioners filed an enormous amount of dilatory-sham pleading, which both the Supreme and Appellate Courts of the State had no choice but to dismiss. Typical of this type of pleading was a "Petition for the Appointment of Special Judges" which the Petitioners filed with the Indiana Supreme Court on December 16, 1969, requesting that the Supreme Court appoint a panel of judges to replace itself to reconsider the Petitioners' Petition for Rehearing filed on December 8, 1969. In dismissing that Petition, the Indiana Supreme Court, Per Curiam, said:

> "To summarize, *this cause* has been fully and finally litigated by virtue of the Appellate Court's decision and our denial of transfer. This Court was extremely reluctant to respond to the instant petition, since it can only be characterized as a dilatory pleading by a party bent on delaying execution of an adverse judgment. To consider the petition in any other light would be to presuppose an immense lack of knowledge on the part of the petitioners relative to the mechanics of Appellate procedure. We are not yet inclined to make that supposition."
>
> *State Ex Rel Mass Transportation Auth. v. Indiana Revenue Board* (1969) —— Ind. ——, 254 N.E. 2d 1, 5.

The dismissed or overruled petitions set out in Question 3 on page 12 of the Petition were all of this nature. In addition the State Auditor made repeated written statements saying that she would not abide by the Court's order.

The Petitioners attempt to make a Federal question out of the fact that the written opinion of the majority was not certified to the Clerk of the Court until one month after the death of one of the judges voting with the majority. Not only is this the first time the objection has been raised, though a year and one half has elapsed since

the judgment was rendered but they don't point out that the minority written opinion was certified down only 3 days before.

Are the Petitioners claiming that Judge Cook did not in fact vote with the majority? There has never been any proof of this offered by the Petitioners, especially since it has never been brought up before.

The Petitioners claim they were unable to obtain judicial review. They have filed five Petitions to Transfer thus far. If they are complaining because they were all denied by a two to two split, this is not true. At least one was denied by a three to none vote. In any case the statute providing for just such a case has long been on the books in Indiana (see Respondent's Appendices, page A-10 & A-11).

VI.

Richard M. Givan and John F. Neff are Not Proper Respondents.

The Petitioners have indicated in their Petition that they also intend to Petition this Court for a Writ of Certiorari on the contempt question. (Petition, page 9) Since Richard M. Givan and John F. Neff were recipients of their fee pursuant to compliance with a rule to show cause, it would seem that, if they should be made respondents anywhere in the proceedings, it should be there.

Here, the question is not the *payment* in compliance with the mandate that is in question, but the decision of the Indiana Courts regarding the repealer, and the subsequent claim of bad treatment of the Petitioners by the Courts. The Respondent's attorneys are in no way involved in that, especially not Judge Givan, who did not participate in the case after February 1, 1968.

CONCLUSION

This Court does not issue a Writ of Certiorari where the non-federal questions have been properly decided by the State Courts and the federal questions, if they exist, have not been seasonably raised.

The Writ should be denied.

Respectfully submitted,

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

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INDIANA REVENUE BOARD, ET AL.
Petitioners,

vs.

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Respondents.

MOTION TO SUBSTITUTE

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Central Publishing Company, Inc., Indianapolis, Ind.

IN THE

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INDIANA DEPARTMENT OF STATE REVENUE,
JAMES O. MATHIS, as Commissioner of the Indiana Department of State Revenue,
THE STATE BOARD OF TAX COMMISSIONERS,
JOSEPH D. GEESLIN, JR., CARLEON L. PHILLIPPI, and DURWOOD STRANG, as Members of the State Board of Tax Commissioners of Indiana,
G. THOMAS BLANKENSHIP, as acting Inheritance Tax Administrator,

Petitioners,

vs.

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Respondents.

MOTION TO SUBSTITUTE

Petitioners respectfully advise the Court that as of July 1, 1970, G. Thomas Blankenship succeeded Richard A.

Green as acting Inheritance Tax Administrator. Accordingly, petitioners move that G. Thomas Blankenship be substituted in the place and stead of Richard A. Green as a party petitioner in the above-entitled cause.

Respectfully submitted,

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MOTION TO DEFER CONSIDERATION AND TO CONSOLIDATE

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MOTION TO DEFER CONSIDERATION AND TO CONSOLIDATE

Petitioners, INDIANA REVENUE BOARD, EDGAR D. WHITCOMB, Governor of the State of Indiana and as

a Member of the Indiana Revenue Board, JOHN K. SNYDER, Treasurer of the State of Indiana and as a Member of the Indiana Revenue Board, TRUDY SLABY ETHERTON, as Auditor of the State of Indiana and as a Member of the Indiana Revenue Board, INDIANA DEPARTMENT OF STATE REVENUE, JAMES O. MATHIS, as Commissioner of the Indiana Department of State Revenue, THE STATE BOARD OF TAX COMMISSIONERS, JOSEPH D. GEESLIN, JR., CARLETON L. PHILLIPPI, and DURWOOD STRANG, as Members of the State Board of Tax Commissioners of Indiana, G. THOMAS BLANKENSHIP, acting as Inheritance Tax Administrator, move that consideration of this cause be deferred until the Petition for a Writ of Certiorari filed on August 28, 1970 and assigned No. 610 is briefed, and that this cause be considered with said No. 610 for the following reasons:

1. The petition in this case, which was filed on June 11, 1970, covers the proceedings below up to the final order of mandate on December 16, 1969, directing the immediate transfer of money;

2. On August 28, 1970, Petitioners filed their second Petition for a Writ of Certiorari which was assigned No. 610, covering the same proceedings below from the mandate order of December 16, 1969, through the contempt proceedings, commitment of the State Auditor and final compliance with the court's mandate, under protest. The later petition may be of help to this court in determining whether certiorari should be granted in this case.

3. Both petitions ask for Writs to the Appellate Court of Indiana, sitting as a trial court. The parties and issues are substantially the same.

For the reasons set out above, it is respectfully submitted that the motion to defer consideration and to consolidate this case with No. 610 should be granted.

Respectfully submitted,

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